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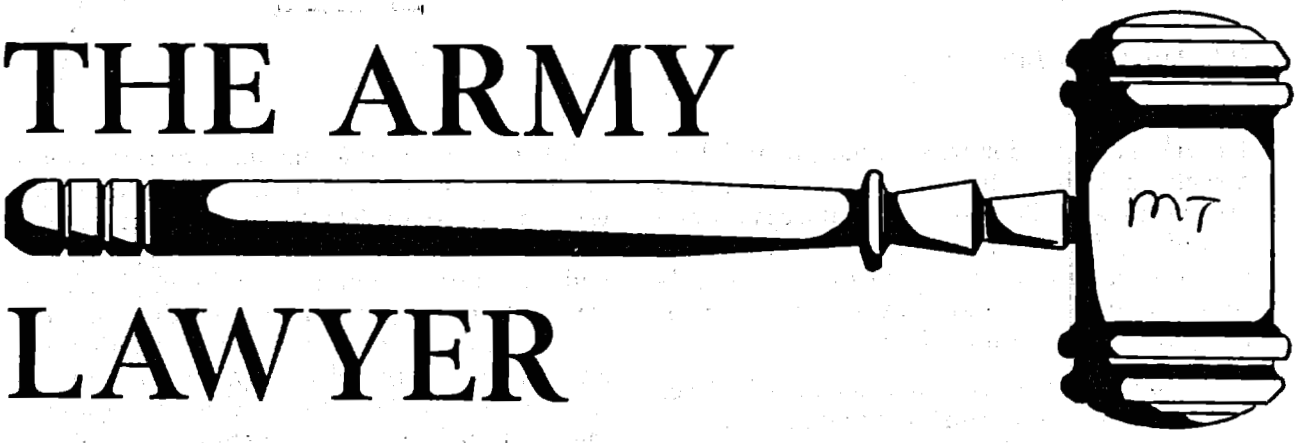

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Pouring Salt on Government Garnishment Liability: The Supreme Court Reverses *Morton*

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I. Introduction

On 19 June 1984, the United States Supreme Court resoundingly answered a question which had caused great concern among federal disbursing agents. In *United States v. Morton*,[1] the Supreme Court ruled unanimously "that the Government cannot be held liable for honoring a writ of garnishment which is 'regular on its face' and has been issued by a court with subject-matter jurisdiction to issue such orders."[2]

As a consequence, federal employees (including members of the military) and retirees whose pay is garnished for alimony and child support arrearages will be required to attack the writs of garnishment, or the underlying orders upon which such writs are based, in the state court which issued the writ or underlying order. Additionally, federal disbursing agents will not be required to look beyond the face of the writ or

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[1] 52 U.S.L.W. 4839 (U.S. June 19, 1984) (No. 83-916).

[2] *Morton*, 52 U.S.L.W. at 4843.

the underlying order when a judgment debtor asserts that either the writ or the underlying order is invalid. The decision reinforces a provision of the federal garnishment statute which protects the government and disbursing officers from liability if payment is made pursuant to legal process regular on its face.

Morton involved a case in which the Air Force honored a writ of garnishment against the pay account of a colonel who notified the Air Force that the state court which issued the writ and the underlying order lacked personal jurisdiction over him. The Air Force, relying on the statutory limit on liability, disregarded the officer's assertions and garnished his pay pursuant to the court order. The decision of a divided panel of the U.S. Court of Appeals for the Federal Circuit[3] against the government was reversed by the Supreme Court. The government argued, and the Supreme Court found, that Congress did not contemplate that disbursing officers or other government officials would be required to conduct the kind of inquiry into personal jurisdiction that the lower court ruling would require.[4]

The administrative burden and additional costs to which the government would have been subjected had the decision of the Federal Circuit been allowed to stand was a critical aspect of the case. The Army alone receives and processes more than 5,000 garnishment actions annually.[5] Officials at the U.S. Army Finance and Accounting Center, Fort Benjamin Harrison, Indiana, expressed concern that not only would the decision have required the hiring of an estimated forty additional attorneys, but also the risk of double liability where the government honored a writ of garnishment later found to be invalid would have been enormous.[6] This aspect was not lost on the dissent in the Federal Circuit decision, nor on the Supreme Court. Dissenting Judge Helen W. Nies commented that the Federal Circuit's majority decision would:

> Create chaos in how the Government would operate in the thousands of garnishments it faces daily. It must either pay twice, or where permitted by a state court, litigate for any employee who raises a substantial claim of jurisdictional irregularity regardless of the regularity of the process "on its face."[7]

[3]Morton v. United States, 708 F.2d 680 (Fed. Cir. 1983).

[4]*Morton*, 52 U.S.L.W. at 4841.

[5]Telephone conversation with Ms. Bernith Velez-Torres, attorney-advisor, Garnishment Office, U.S. Army Finance and Accounting Center, Fort Benjamin Harrison, Indiana, 28 June 1984.

[6]Telephone conversation with Mr. Dave Gagermeier, Chief, Garnishment Office, U.S. Army Finance and Accounting Center, Fort Benjamin Harrison, Indiana, 9 July 1984.

[7]*Morton*, 708 F.2d at 703.

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As author of the Supreme Court's unanimous decision, Justice John Paul Stevens acknowledged that this aspect was also a principal reason the Court granted certiorari: "Because the holding of the Federal Circuit creates a substantial risk of imposing significant liabilities upon the United States as a result of garnishment proceedings, and because the decision below created a conflict in the Circuits, we granted the Government's petition for certiorari...."[8]

II. Background

Prior to 1974, compensation received by employees of the federal government, including members of the armed services, was not subject to legal process to enforce legal obligations, including alimony and child support. In *Applegate v. Applegate*,[9] the ex-wife of a retired Navy officer sued both the retired officer and the disbursing officer at the Norfolk Naval Station seeking to have the retired officer's pay sequestered and paid over to her pursuant to a writ of garnishment for past-due alimony. In granting the Navy's motion to dismiss, the district court noted:

> While the Congress has seen fit to waive the immunity of the United States from suit in the case of certain money claims against it and also in the case of many of the corporations created by it, it has so far never waived that immunity and permitted attachment or garnishee proceedings against the United States or its Disbursing Officers.[10]

Concerns increasingly were expressed, however, that those receiving compensation from the federal government were largely immune from garnishment to enforce alimony and child support obligations, often to the severe detriment of spouses, former spouses, and children.[11] A 1971 study by the Rand Corporation documented widespread problems in the area of enforcement of support obligations, and, in particular, commented on the inability to collect child or spousal support from military personnel and federal employees with garnishment proceedings.[12] Members of Congress echoed those concerns. Addressing his colleagues, Senator Joseph M. Montoya of New Mexico spoke in favor of proposed legislation to remove federal immunity and permit writs of garnishment for alimony and child support obligations to be honored. He stated:

> The proposal is not new. I believe it is time for us to make sure that this small change is made in our law in order to correct what is patently a disgraceful situation. We must give the wives and children of Federal employees and retirees the same legal protections which we have provided for all other American women and children.[13]

The result was passage of legislation contained within the Social Services Amendments of 1974 (effective 1 January 1975) which provided that compensation received by federal employees, service members, and retirees as "remuneration for employment" would be subject to legal process brought to enforce legal obligations to pay alimony and child support.[14] Two years after that provision took effect, Congress amended the law to provide that:

> Neither the United States, any disbursing officer, nor any governmental entity shall be liable with respect to any payment made from moneys due or payable from the United States to any individual pursuant to legal process, regular on its face, if such payment is made in accordance with

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[8] *Morton*, 52 U.S.L.W. at 4841.

[9] 39 F. Supp. 807 (E.D. Va. 1941).

[10] *Id.* at 890.

[11] Those seeking writs of garnishment against federal employees or members of the military could attempt to locate bank and savings accounts or similar assets of the federal employee or service member, but this was often difficult, time-consuming, and in many cases, might often work once—after which the judgment debtor could simply close the account or liquidate the assets.

[12] *See* S. Rep. No. 1356, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 8133, 8147.

[13] 120 Cong. Rec. 40,338-39 (1974).

[14] Social Services Amendments of 1974, Pub. L. No. 93-647, § 459 (a), 88 Stat. 2357-58 (codified at 42 U.S.C. § 659(a) (1976)).

this section and regulations issued to carry out this section.[15]

III. The *Morton* Facts

While this national drama over garnishment of federal compensation for alimony and child support was unfolding in Congress in the early 1970s, a drama of a more limited and personal nature was unfolding not too many miles distant in northern Virginia. In 1969, upon his return from Vietnam, Air Force Colonel Alan Wayne Morton was reassigned to northern Virginia. He and his wife, Patricia Kay Morton, bought a home in the area and moved there with their two sons.[16] Marital difficulties ensued. In August 1973, Morton was notified that his next assignment would be to Elemendorf Air Force Base, Alaska.[17] The parties separated in September 1973 and entered into a written separation agreement on 15 September 1973. The following day, Mrs. Morton moved with the couple's two sons from Virginia to Alabama.

The separation agreement provided that Colonel Morton was to receive the Virginia home and Mrs. Morton was to receive various other personal property. Mrs. Morton also agreed to sign the deed when the house was sold. Colonel Morton occupied the house until May 1974, when he moved to Alaska.[18] Under other provisions of the separation agreement, Colonel Morton agreed to pay $500 per month as separate maintenance, including support for both children. The $500 monthly payment was to continue for thirty months, after which it would decrease to $200 per month for thirty-three months, then cease altogether.[19] Finally, the agreement contained a "merger" clause which provided that if either party sued for divorce, the court would be requested to incorporate provisions of the separation agreement into any resulting decree.[20]

Colonel Morton had been domiciled in Alabama. Upon his transfer in Alaska, however, he began taking steps to change his domicile from Alabama to Alaska.[21] In June 1974, he asked the Air Force finance office at Elemendorf to change his records to reflect Alaska as his domicile for tax purposes.[22] The Air Force failed to make the requested change, and, despite several other attempts by Colonel Morton, it was not until April 1976 that the change was finally made.[23]

The Court of Claims found that by the time Mrs. Morton filed for divorce in Alabama, in August 1974, Colonel Morton was no longer a domiciliary of Alabama but was domiciled in Alaska.[24] In her suit, Mrs. Morton requested $500 per month alimony and child support. Colonel Morton received notice by registered mail in September 1974, but did not respond or otherwise enter an appearance to contest jurisdiction. Instead, he contacted a military attorney at Elemendorf Air Force Base who advised him that service by mail was insufficient to support a money judgment against him.[25] Mrs. Morton obtained a default judgment for divorce in August 1975 which ordered Colonel Morton to pay $500 per month alimony and partial support and maintenance for the two children.[26] The Alabama court was apparently never advised of the Virginia separation agreement, a factor which influenced the Court of Claims in

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[15] 91 Stat. 157-62 (codified at 42 U.S.C. § 659(f) (1976)).

[16] *Morton*, 708 F.2d at 682.

[17] *Id.*

[18] No. 290-77, slip op. at 2-10 (Ct. Cl. Dec. 14, 1981). Shortly before leaving for Alaska, Colonel Morton found a buyer for the house, but Mrs. Morton refused to sign the deed, apparently insisting upon a share in the proceeds of the sale of the house, which she had given up under terms of the separation agreement. Colonel Morton brought a suit for specific performance in July 1984. *See* 3-4 and 10.

[19] *Id.* at 2-4. The amount paid was based on the ages of the children.

[20] *Id.*

[21] *Id.* at 13. These steps included notifying co-workers that he intended to make Alaska his home; contracting to buy a home in Alaska (the contract fell through when Mrs. Morton refused to sign the deed on the Virginia home); registering to vote in Alaska; paying 1975 state income taxes in Alaska.

[22] *Id.*

[23] *Id.*

[24] *Id.* at 12, 15.

[25] *Morton*, 708 F.2d at 682-83.

[26] *Id.* at 683.

its decision in favor of Mrs. Morton.[27] Colonel Morton, however, had continued to pay $500 per month pursuant to the Virginia separation agreement, and, accordingly, lowered his payments to $200 per month in February 1976 when his oldest child became eighteen.[28] Thereafter, arrearages began to accrue on the Alabama decree and in December 1976, Mrs. Morton obtained a writ of garnishment for $4,100.[29]

The writ was duly served on the Air Force, which notified Colonel Morton. Again, he immediately sought advice from a military attorney, who assured him that his pay could not be legally garnished based on a lack of jurisdiction, an argument which Morton promptly relayed to the local Air Force finance officer. The Air Force, however, confessed judgment, deducted the money from Morton's pay account, and paid it over pursuant to the writ of garnishment.[30] Over Morton's protestations, several other garnishment writs were similarly honored, all of which eventually totalled more than $18,000,[31] and prompted Colonel Morton to bring suit in 1977 in the Court of Claims to recoup from the government all such back pay.

IV. The Supreme Court Decision

The Federal Circuit decision substantially adopted the positions taken by Judge Martin White, a senior trial judge, who authored the Court of Claims decision. Justice Stevens, however, found persuasive several arguments raised by Judge Nies in her extensive dissent.[32]

The first issue addressed by the court was the Federal Circuit's conclusion that a court of "competent jurisdiction" for purposes of the federal garnishment statute meant both a court of subject-matter jurisdiction and a court with personal jurisdiction over the judgment debtor. The Federal Circuit found that the Alabama garnishment writ was not "legal process" within the meaning of the federal garnishment statute because the Alabama court did not have personal jurisdiction over Colonel Morton.[33] Therefore, the lower court reasoned that the Air Force could not escape liability under the provisions of section 659(f), at that subsection provided protection only for writs issued by courts of competent jurisdiction. The Supreme Court disagreed. The Court noted that although "competent jurisdiction" sometimes may include jurisdiction over a defendant's person, statutory phrases cannot be construed in isolation but must be analyzed in the context of the complete statute.

Justice Stevens pointed out that the Federal Circuit based its jurisdictional opinion solely upon the phrase "legal process," ignoring the limiting phrase "regular on its face." He found that when the complete phrase, "legal process, regular on its face," is read in context with the phrase "court of competent jurisdiction," the only reasonable interpretation that could follow is that a disbursing agent need only ascertain that the issuing court had subject-matter jurisdiction to issue such writs.[34] He pointed out that to determine the type of individual interests involved if "court of competent jurisdiction" included personal jurisdiction would require the garnishee (disbursing agent) to look beyond the "face" of the process, an action not required by the plain language of the statute:

> The strength of this interest in a particular case cannot be ascertained from the "face" of the process; it can be determined only by evaluating a specific aggregation of facts, as well as the possible vagaries of the law of the forum, and then determining if the relationship between the defendant—in this case the obligor—and the forum, or possibly the particular controversy, makes it reasonable to expect the defendant to defend the action that has been filed in the forum State. The statutory requirement that the garnishee refer only to the "face"

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[27] *Morton*, No. 290-77, slip op. at 7-8.

[28] *Id.* at 4.

[29] *Morton*, 708 F.2d at 682.

[30] *Id.* at 683.

[31] *Morton*, No. 290-77, slip op. at 1, 5-6.

[32] *Morton*, 708 F.2d at 690-707 (Nies, J., dissenting).

[33] *Id.* at 685-86.

[34] *Morton*, 52 U.S.L.W. at 4841.

> of the process is patently inconsistent with the kind of inquiry that may be required to ascertain whether the issuing court has jurisdiction over the obligor's person.[35]

It is interesting to note that both the government and the Court assumed that the Alabama court did, in fact, lack personal jurisdiction over Colonel Morton to issue the writs of garnishment.[36] Nevertheless, according to the Court, the Air Force is fully protected from liability based on the plain wording of the statute.

The second basis for the Court's decision was that to permit the federal government to be held liable as a garnishee would result in the government being treated differently than a similarly situated private employer.[37] This was inappropriate, the Court pointed out, because Congress intended in the garnishment statute that the government receive the same treatment as a private employer with respect to garnishment orders.[38] The Court recited the long standing rule of law in most states that when an obligor (such as Colonel Morton) receives notice of the garnishment, the garnishee cannot be held liable for honoring a writ of garnishment. The Court then compared the law of both Alaska and Alabama and found that both states followed this rule.[39]

The third basis for the decision dealt with the underlying purpose of the garnishment statute to afford speedy relief to wives and children:

> The underlying purpose of § 659 is significant. The statute was enacted to remedy the plight of persons left destitute because they had no speedy and efficacious means of ensuring that their child support and alimony would be paid. Burdening the garnishment process with inquiry into the state court's jurisdiction over the obligor can only frustrate this fundamental purpose as a consequence of the resulting delay in the process of collection.[40]

Finally, the Court concluded with what has come to be a favorite theme for it: When Congress invests government agencies with the authority to promulgate regulations to interpret federal statutes, the regulations ought to be given controlling weight,[41] unless the regulations are "arbitrary, capricious, or plainly contrary to the statute."[42] The regulations issued by the Office of Personnel Management (OPM)[43] governing the processing of writs of garnishment for all federal agencies, including the military services, contain a specific provision that if a governmental entity receives legal process which on its face conforms to the laws of the issuing jurisdiction, the entity is not required to investigate whether the authority which issued the legal process had personal jurisdiction over the obligor.[44] Attorneys for Colonel Morton argued that this provision was not promulgated by OPM until after the *Morton* case arose in the Court of Claims and the Federal Circuit, and had in fact been promulgated in response to the case. The Court found that fact of no consequence:

> Congress authorized the issuance of regulations so that problems arising in the administration of the statute could be addressed. Litigation often brings to light latent ambiguities or unanswered questions that might not otherwise be apparent.... When OPM responded to this problem by issuing regulations it was doing no more than the task which Congress had assigned it.[45]

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[35] *Id.*

[36] *Id.*

[37] *Id.* at 4842.

[38] *Id.*

[39] *Id.*

[40] *Id.* at 4842-43.

[41] *See, e.g.*, Ford Motor Credit v. Milhollin, 444 U.S. 555, 559-60 (1980), where the Court discusses a similar grant of authority by Congress to the Federal Reserve Board to promulgate regulations to interpret the Truth in Lending Act; Schweiker v. Gray Panthers, 453 U.S. 34, 44 (1981); and Batterton v. Francis, 432 U.S. 416, 425-26 (1977).

[42] *Morton*, 52 U.S.L.W. at 4843.

[43] *Id.*

[44] *Id.*

[45] *Id.*

Because the Court assumed that the Alabama court lacked personal jurisdiction over Colonel Morton to issue the writs of garnishment and that the government need only ascertain that the Alabama court had subject-matter jurisdiction, it was unnecessary for the Court to address the extensive discussion of personal jurisdiction engaged in by the Federal Circuit majority.

V. Conclusion

Had the Supreme Court affirmed *Morton*, the decision could arguably have been limited to its facts, *i.e.*, Colonel Morton asserted the invalidity of the Alabama writ of garnishment before the Air Force confessed judgment and deducted the amounts ordered from his pay. It would not have helped those persons who did not assert the invalidity of the order before the deductions were made. In its reversal, however, the Court gives disbursing agents a broad mandate and wide discretion to implement the federal garnishment statute.[46] At the same time, the Court makes it clear that federal employees and military members who wish to raise objections to garnishment actions against their pay will be required to contest such writs in the issuing state court, not in federal court or through federal administrative channels. In reversing *Morton*, the Court reaffirms positions taken by the Comptroller General[47] and the Fourth Circuit.[48]

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[46]The *Morton* case makes history not only because it is the first Supreme Court case to address the liability of the government or government officials for honoring legal process "regular on its face," but also because it is the first case to be resolved by the Supreme Court arising out of the new U.S. Court of Appeals for the Federal Circuit, which came into existence on 1 October 1982. (Telephone conversation with Mr. Spencer Green, Clerk of Court's Office, U.S. Court of Appeals for the Federal Circuit, 2 July 1984.) The Federal Circuit was created by the Federal Courts Improvement Act of 1982 (*see* Pub. L. No. 97-164, 96 Stat. 25 (1982)). *Morton* was filed in the Court of Claims and decided by that court's trial division on 14 December 1981, in Colonel Morton's favor. Appeal was taken by the government to the Court of Claims' appellate division. While on appeal, the Federal Courts Improvement Act took effect, transforming the Court of Claims' trial division into the U.S. Claims Court and combining the Court of Claims appellate division with the U.S. Court of Customs and Patent Appeals to create an entirely new court, the U.S. Court of Appeals for the Federal Circuit. All cases pending before the Court of Claims' appellate divisions were transferred to the new Federal Circuit. The Federal Circuit decision was announced 17 May 1983. The government's petition for a rehearing was denied on 5 July 1983, and, on 2 December 1983, a petition for certiorari was filed by the government. The petition was granted on 23 January 1984 (*see* 10 Fam. L. Rptr. 1165 (Jan. 24, 1984)).

[47]*In re* Matthews, 61 Comp. Gen. 229 (1982).

[48]Calhoun v. United States, 55 F.2d 401 (4th Cir.) *cert. denied*, 434 U.S. 966 (1977).

Military Family Housing: Our Home Sweet Home

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I. Introduction

One subject that raises numerous questions during TJAGSA fiscal law courses is the funding of military family housing. This article will address many of those questions and provide judge advocates with a usable guide to this difficult subject area.

Each year Congress authorizes and appropriates billions of dollars for the construction of new family housing units, improvements to existing housing, and the operation and maintenance of these family housing units. Historically, the authority and money for these purposes has been found in the Military Construction Authorization and Military Construction Appropriation Acts. Additionally, in July 1982, Congress passed the Military Construc-

tion Codification Act,[1] the purpose of which was to revise and codify the recurring provisions of annual Military Construction Authorization Acts in a new chapter of title 10 of the United States Code. The goal of this legislation was to insure the unified treatment of the permanent law relating to military construction[2] and family housing.

The new chapter added to title 10 is chapter 169—Military Construction and Military Family Housing. This chapter is composed of three subchapters: Subchapter I—Military Construction; Subchapter II—Military Family Housing; and Subchapter III—Administration of Military Construction and Military Family Housing. Those subchapters and sections applicable to family housing are listed in Appendix A of this article.

Prior to July 1982, the sections now codified in chapter 169 were scattered throughout Military Construction Authorization Acts. However, it should be noted that the enactment of the Military Construction Codification Act does *not* eliminate the need for the practitioner to refer to the Military Construction Authorization and Military Construction Appropriation Acts. For example, 10 U.S.C. § 2821 (1982) states that "[f]unds may not be appropriated for construction, acquisition, leasing, additions, extensions, expansions, alterations, relocations or operation and maintenance of family housing unless the appropriation of such funds has been authorized by law." Therefore, the practitioner must review the Military Construction Authorization and Military Construction Appropriation Acts each year to determine what Congress has authorized the Department of Defense (DOD) to build, improve, operate, and maintain.

II. Funding for Family Housing

Congress provides funds for the operation, maintenance, repair, and construction of military family housing in the annual Military Construction Appropriation Act (MCA). Funds for family housing are allocated to a single DOD Military Family Housing Management Account.[3] It should be noted that the funds made available for the family housing account are separate from the funds provided for other types of military construction found in the MCA. Upon receiving these funds, DOD further allocates the funds to the respective services (Army, Navy, and Air Force). The services in turn manage these funds in accordance with their regulations.[4]

In the Army, the family housing account is broken down into three programs: Debt Payment—BP 1600/1700 Funds; Construction—BP 1800 Funds; and Operation and Maintenance—BP 1900 Funds.[5] The flow chart at Appendix B illustrates the funding process described above.

The focus of the remainder of this article will be on the maintenance, repair, and construction of family housing within the Army. Emphasis is placed on these aspects of family housing because these areas have historically created the greatest fiscal law problems.

III. The Army Family Housing Accounts

Regulatory guidance for family housing in the Army is found in chapters 5 and 6 of AR 210-50. Chapter 5 addresses operation and maintenance programs while chapter 6 covers new construction programs and post acquisition construction programs (also known as improvements to existing quarters). The practitioner should note, however, that AR 210-50 is currently under revision and is subject to frequent

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[1]Pub. L. No. 97-214, 96 Stat. 153 (1982) (codified at 10 U.S.C. §§ 2801-2861 (1982)).

[2]*See* Murrell, *Major Changes in Minor Construction*, The Army Lawyer, Mar. 1983, at 25.

[3]10 U.S.C. § 2831 (1982).

[4]U.S. Dep't of Army, Reg. No. 210-50, Family Housing Management (1 Feb. 1982) [hereinafter cited as AR 210-50].

[5]It is important to realize that Family Housing Operation and Maintenance (FHO&M) funds are *not* the same as Operation and Maintenance, Army (OMA) funds. These two funds have different appropriation acts as their source.

change by messages and letters from the Corps of Engineers.[6]

IV. Maintenance, Repair, and Construction of Family Housing

AR 210-50 covers three broad categories of work[7] relative to family housing, *i.e.*, maintenance, repair, and construction. The definitions of these categories are:

> Maintenance—the recurring day to day periodic or scheduled work required to preserve or maintain real property in such a condition that it may be used for its designated purpose, including work that is required to prevent damage or deterioration to the property.
>
> Repair—the restoration of a failed or failing real property facility to such a condition that it may be effectively used for its designated purpose, including the overhaul, replacement, or reprocessing of parts and materials which have deteriorated by the elements or wear and tear in use.
>
> New Construction—the erection, installation, or assembly of a new facility. Construction also includes the alteration, addition, expansion, or extension of an existing facility.[8]

At first blush the definitions for maintenance and repair seem indistinguishable; however, they are different and subject to different treatment under AR 210-50. Maintenance should be viewed as that work which must be done in order to maintain the status quo, with the status quo being quarters that comply with government standards. Work that maintains the status quo includes changing the filters in furnaces, painting, caulking, refastening siding on quarters, sealing asphalt pavements. Repair, on the other hand, is something more than maintenance. Repair envisions doing work necessary to bring the quarters up to government standards.

The concept of construction is more straightforward. Construction is the building of new quarters from the ground up. It also includes "improvements" to existing quarters. Improvements consist of the alteration, addition, expansion or extension of existing facilities, including a facilities rehabilitation.[9]

A. Maintenance Projects (FHO&M—1900 Funds)

Before maintenance work can be accomplished, the project has to be approved. AR 210-50 authorizes the MACOM commander to approve maintenance projects. Installation commanders may also approve such projects if that authority has been redelegated by the MACOM commander.[10] At the present time it is common for MACOM commanders to redelegate approval authority to their installation commanders.

If a particular project is exclusively for maintenance work, the regulations place no cost limitation on the project that may be approved. However, if improvement work is accomplished concurrently with maintenance, the total cost of all work for an individual dwelling unit may not exceed $30,000 per fiscal year.[11] This $30,000 figure is statutorily imposed[12] and failure to comply with this limitation on spending constitutes a violation of 31 U.S.C. §§ 1341(a), 1517 (1982) (formerly known as the "Anti-Deficiency Act").

The only exception authorized to this $30,000

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[6]For example, Letter, DAEN-ZCH-F, HQDA, 28 Oct. 1982, subject: Family Housing Delegations of Authority, made several substantive changes to chapters 5 and 6, and appendix E of AR 210-50. These changes have been incorporated into this article, and the revised appendix E of AR 210-50 is set forth at Appendix C of this article.

[7]This article will not discuss those funds in the FHO&M account set aside for operations. *See* AR 210-50, paras. 5-13,-15 for a discussion of the operations portion of the FHO&M Program.

[8]AR 210-50, app. A.

[9]"Alteration" is work done to the interior of a building; "addition, expansion or extension" is work done to the exterior of a set of quarters.

[10]AR 210-50, para. 5-23*h*, app. E. *See also* Letter, DAEN-ZCH-F, *supra* note 7.

[11]10 U.S.C. § 2825(b)(1); AR 210-50, para. 5-23*b*; Letter, DAEN-ZCH-F, *supra* note 7.

[12]10 U.S.C. § 2825(b)(1) (1982).

limitation is where a maintenance project starts out at less than $30,000 but during performance a problem develops involving improved work that could not be discovered before award of the contract.[13] For example, a contract calls for maintenance work on the kitchen floor. During performance of the contract it is discovered that the maintenance work cannot be done unless the entire subfloor in the kitchen is replaced at a price in excess of $30,000. Such a replacement would constitute improvement work done concurrently with maintenance and would otherwise be prohibited but for this exception. In such a situation the work may be accomplished; however, the installation must submit the project for review to the Department of the Army (DA), who in turn will notify Congress.[14]

B. Repair Projects (FHO&M—1900 Funds)

Like maintenance work, before repair work can be accomplished the project has to be approved. The MACOM is the approval authority for repair projects up to $500,000 per project, subject to an "administrative limit of 50% of the replacement cost of the affected facility in projects above $100,000."[15] This means that if the cost of a repair project is more than $100,000 but less than $500,000, the cost of any repair that the MACOM commander can approve is limited to 50% of the replacement cost. Thus, if it costs $100 to replace a particular facility but only $49 to repair the facility, the MACOM commander could approve the repair project. However, if it costs $100 to replace a particular facility but $51 to repair it, the MACOM could not approve the repair project because it exceeds the 50% administrative limit. This 50% administrative limit does not apply to repair projects less than $100,000. AR 210-50 also indicates that the installation commander may approve repair projects if redelegated that authority by the MACOM commander.[16]

AR 210-50 further indicates that HQDA approves all repair projects in excess of $500,000 per project, and when the repair work is in excess of the 50% replacement cost of the affected facility in projects above $100,000.[17]

As with maintenance work, when repair work is done concurrently with improvement work, the total cost of all work for an individual dwelling unit may not exceed $30,000 per fiscal year.[18] Also, just like maintenance work, failure to comply with this statutory limitation on spending will constitute a violation of 31 U.S.C. §§ 1341(a), 1515 (1982). Repair work is covered by the same exception to this limitation as discussed above with maintenance work.[19]

There is an additional administrative limitation imposed by AR 210-50 when repair work is contemplated and no improvement work will be involved: the cost for repairs is limited to $30,000 for any one dwelling unit per fiscal year.[20] One of the recurring questions in this area is whether the failure to comply with this administrative limitations will constitute a violation of 31 U.S.C. §§ 1341(a), 1515 (1982). The answer to that question is *NO*. Since these administrative limitations are found only in AR 210-50 and not proscribed in the AR 37 series, there is no regulatory violation of the type that would trigger the applicability of title 31.

C. Incidental Improvement Projects (FMO&M—1900 Funds)

One of the more interesting and confusing aspects of family housing is the treatment of incidental improvement projects. Incidental improvements are alterations, additions, expansions, or extensions done to existing dwelling units which are within the cost limitations of the FHO&M 1900 Program.[21] In short, we are talking about construction which may be

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[13] AR 210-50, para. 5-23*d*.

[14] AR 210-50, para. 5-23*f*. The project is submitted by the installation/MACOM to HQDA(DAEN-MPH), WASH DC 20314.

[15] AR 210-50, para. 5-23*e*, *h*, app. E. *See also* Letter, DAEN-ZCH-F, *supra* note 7.

[16] AR 210-50, para. 5-23*e*, *h*, app. E.

[17] *Id.*

[18] AR 210-50, para. 5-23*b*.

[19] *Id.* para. 5-23*d*.

[20] *Id.* para. 5-23*c*. This administrative limit of $30,000 for any one dwelling unit per fiscal year does *not* apply to pure maintenance work.

[21] *Id.* para. 5-23*a*, app. A.

funded with FHO&M funds, although one might expect that all construction work would be covered by chapter 6 of AR 210-50. However, in chapter 5 of AR 210-50, we are informed that improvements to existing dwelling units will be done in accordance with chapter 6, AR 210-50 only when the cost exceeds the cost limitations of the FHO&M 1900 Program.[22]

There is a statutory limitation on the amount of money that may be spent on incidental improvement work. When the incidental improvement work is accomplished *concurrently* with maintenance or repair work, the total cost of all work will not exceed $30,000 per fiscal year for each individual dwelling unit.[23] Failure to comply with this statutory limitation would constitute a violation of 31 U.S.C. §§ 1341(a), 1515 (1982).

In addition to this statutory limit, AR 210-50 places an administrative limitation on incidental improvements. The total cost for all incidental improvements within a fiscal year may not exceed $2,000 for any one dwelling unit, and the total of the incidental improvement project will not exceed $50,000.[24] Thus, within one fiscal year an installation could engage in an incidental improvement project that encompassed twenty-five dwelling units, spending no more than $2,000 per dwelling unit. As with other administrative limits, failure to comply would *not* constitute a violation of 31 U.S.C. §§ 1341(a), 1515 (1982).

The MACOM commander is the approval authority for projects in excess of the administrative limits discussed above.

D. Construction Projects (FH Construction—1800 Funds)

Construction of family housing falls into two categories: new family housing construction,[25] and post acquisition construction (improvements to existing housing).[26]

(1) New Family Housing Construction

This category of construction is straightforward and is what most people envision when they think of family housing. This category encompasses the building of quarters that did not exist before and the planning, programming, and budgeting necessary for their erection. This type of construction is initiated by Army installations and is then consolidated into the DA and DOD budget requests submitted to Congress. If Congress agrees with these proposals, it will authorize the construction of family housing units and appropriate the funds necessary to implement the project. This process is generally referred to as the line item authorization/appropriation process. An example of a line item authorization is set out at Appendix D.

(2) Post Acquisition Construction Program

This is the only means of making improvements to existing quarters other than those permitted under the Incidental Improvement Program authorized under the FHO&M—BP 1900 Program. The type of work envisioned here is the alteration, addition, expansion, or extension of existing dwelling units or their associated real property that exceeds the cost limitations under the FHO&M Program.[27] AR 210-50 is clear in its intent that improvements which exceed the cost limitations for incidental improvements funded by FHO&M be planned, programmed, and budgeted under the Post Acquisition Construction Program.

The Post Acquisition Construction Program consists of two parts: Line Item Improvement Program,[28] and Minor Construction Improvement Projects.[29] The goal of the Line Item Improvement Program is to modernize existing quarters. This program involves planning, programming, and budgeting to obtain DA and DOD approval and, eventually, congressional authorization and appropriation. If the total cost of an improvement exceeds the statutory limitation of $30,000 per dwelling unit, it can only be accomplished by this program.

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[22] *Id.* paras. 5-23*a*, 6-4, app. A.

[23] 10 U.S.C. § 2825(b)(1) (1982); AR 210-50, para. 2-23*b*(1).

[24] AR 210-50, para. 5-23*a*(1), (3); Letter, DAEN-ZCH-F, *supra* note 7.

[25] AR 210-50, ch. 6, sec. II.

[26] *Id.* paras. 5-23*a*(5), 6-4.

[27] *Id.* para. 5-23*a*(5), ch. 6.

[28] *Id.*

[29] *Id.*

The Minor Construction Improvement Project is to be used when:

The improvement of quarters cannot wait for the Line Item Improvement Program to run its course; or

The improvement project does not warrant use of the Line Item Improvement Program, *i.e.*, less than $30,000 but is beyond the scope of the incidental improvement program under FHO&M—1900 Funds; or

The improvement is to restore fire and storm damaged units when cost exceeds the limit of the FHO&M program as repair.

MACOM commanders have been delegated approval authority for minor construction improvement projects up to $20,000 per project and up to $20,000 per dwelling unit per fiscal year.[30] Installation commanders may approve these kinds of projects if redelegated that authority by the MACOM commander.

E. Repair or Restoration of Damaged Quarters

The statutory cost limitation of $30,000 per dwelling unit does *not* apply to the repair or restoration of any dwelling unit damaged by fire, flood, or other disaster.[31]

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[30]Letter, DAEN-ZCH-F, *supra* note 7.

[31]AR 210-50, paras, 5-23*b*(3), 6-15.

Appendixes

Appendix A

Title 10 U.S.C., subtitle A, General Military Law, *chapter 169*—Military Construction and Military Family Housing.

Subchapter II—Military Family Housing.

§ 2821.	Requirement for authorization of appropriations for construction and acquisition of military family housing.
§ 2822.	Requirement for authorization of number of family housing units.
§ 2823.	Determination of availability of suitable alternative housing for acquisition in lieu of construction of new family housing.
§ 2824.	Authorization for acquisition of existing family housing in lieu of construction.
§ 2825.	Improvements to family housing units.
§ 2826.	Limitations on space by pay grade.
§ 2827.	Relocation of military family housing units.
§ 2828.	Leasing of military family housing.
§ 2829.	Multi-year contracts for supplies and services.
§ 2830.	Occupancy of substandard family housing units.
§ 2831.	Military family housing management account.
§ 2832.	Homeowners assistance program.

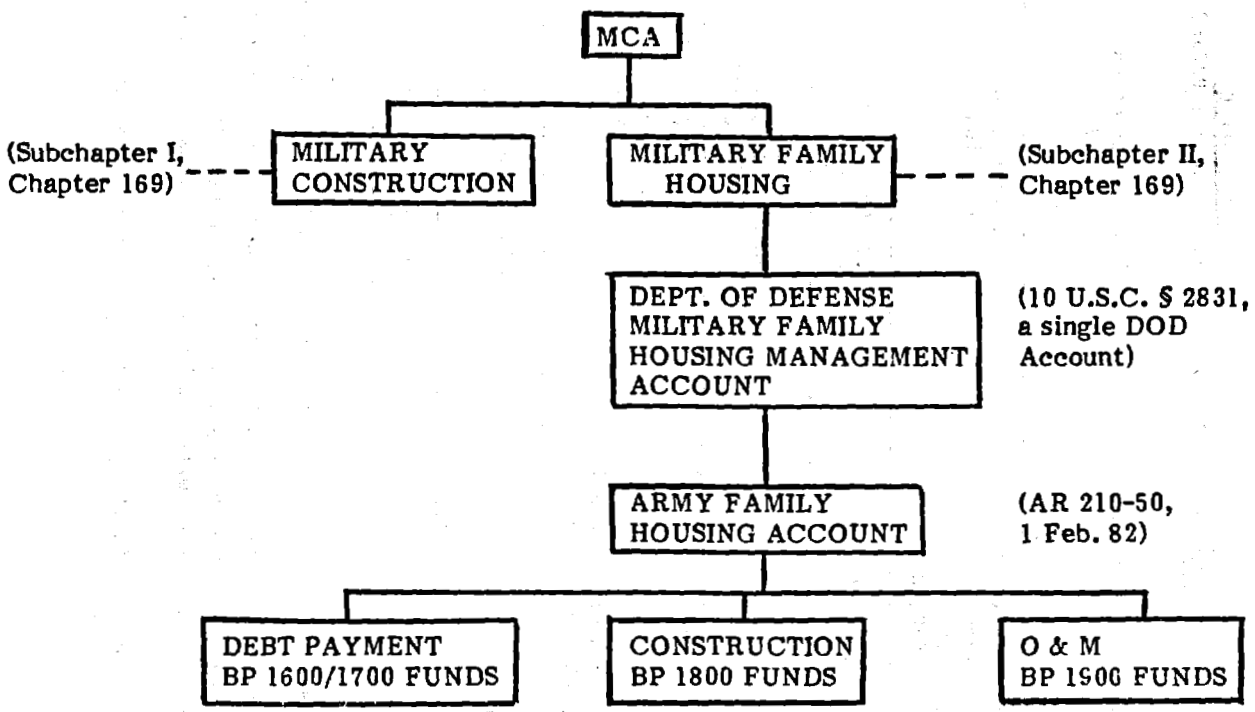
Subchapter III—Administration of Military Construction and Military Family Housing.

§ 2851.	Supervision of military construction projects.
§ 2852.	Military construction projects: waiver of certain restrictions.
§ 2853.	Authorized cost variations.
§ 2854.	Restoration or replacement of damaged or destroyed facilities.
§ 2855.	Law applicable to contracts for architectural and engineering services and construction design.

§ 2856. Limitations on barracks space by pay grade.
§ 2857. Use of solar energy systems.
§ 2858. Limitation on the use of funds for expediting a construction project.
§ 2859. Transmission of annual military construction authorization request.
§ 2860. Availability of appropriations for five years.
§ 2861. Annual report to Congress.

Appendix B

Funding Process Flow Chart



APPENDIX C

10/25/82

FAMILY HOUSING DWELLING UNIT (D.U.) & PROJECT APPROVAL AUTHORITIES

	Major Improvements	Minor Construction P. 1832	Maintenance and Repair O&M	Incidental Alterations P. 1920
Congress/ Stat Limit	Appropriation & Authorization LIIP/ECIP D.U. > $30,000	Appropriation & Authorization	Authorization & Appropriation	Authorization & Appropriation
OSD	Apportionment	D.U. Delegated Proj Delegated	Delegated	Delegated
OASA	None	D.U. Delegated Proj > $500,000 < $1,000,000	D.U. > $30,000 FY Proj - > $500,000	Delegated
OCE	None Reprogramming Authority (W/OASA coordination)	D.U. > $20,000 < $30,000 FY Proj > $200,000 < $500,000	Delegated	D.U. > $2,000 - < $30,000/FY Proj Delegated
MACOM	None	D.U. < $20,000/FY Proj < $200,000	D.U. < $30,000/FY Proj < $500,000 1/	D.U. < $2,000/FY (May be redelegated) Proj < $200,000
Intermediate Command	None	As Delegated by MACOM	As Delegated by MACOM	D.U. < $2,000/FY Proj < $50,000
Installation	None	None		

< = Less than > = More than 1/ Approval is limited to 50% of replacement cost to MACOM

- Cost limitations vary by construction cost index (+ or -) except incidental alterations.
- Total combined cost of M, R, and I is limited to $30,000 per D.U. per FY in foreign countries. CCI flex and foreign currency reate fluctiation will not be applied to this limitation. This limit excludes service orders for maintenance and repair.
- Legal limitation of $30,000 applies to improvement of a D.U. Includes all concurrent costs for M&R on D.U. and on associated other real property.

Appendix D

Line Item Authorization Process

The following is extracted from the Military Construction Authorization Act, 1982. [P.L. 97-99]:

Authorization To Construct Or Acquire Housing

...

Sec. 601(c) Family Housing units:

Marine Corps Air Station, El Toro, California, two hundred and twelve units, $15,540,000.
Fort Irwin, California, four hundred and fifty-four units, $32,055,000.
Naval Complex, San Diego, California, two hundred and ninety units, $25,350,000.
Naval Submarine Support Base, Kings Bay, Georgia, one hundred and sixty-five units, $12,740,000.
Picatinny Arsenal, New Jersey, twenty-six units, $2,141,000.
Fort Drum, New York, two hundred and thirty-two units, $15,865,000.
Naval Air Station, Chase Field, Texas, eighty-eight units, $6,360,000.
Incirlik Air Base, Turkey, four hundred units, $29,000,000.
Greenham-Common, United Kingdom, two hundred and seventy units, $27,200,000.
Classified Location Overseas, six units, $765,000.

Determining Unit "Membership" for Appointment of Enlisted Personnel to Courts Martial

Captain Richard P. Laverdure
Office of the Staff Judge Advocate, VII Corps
and
Captain Charles S. Arberg
Government Appellate Division, USALSA

In *United States v. Wilson*,[1] the U.S. Army Court of Military Review addressed a rare problem and intriguing point of law concerning membership of enlisted personnel on courts-martial. The issue concerned Article 25 (c)(1) of the Uniform Code of Military Justice which states: "Any enlisted member of an armed force on active duty who is not a member of the same unit as the accused is eligible to serve on general and special courts-martial for the trial of any enlisted member...."[2]

Wilson was tried on 24 November 1981. Although the issue was not raised at trial, the staff judge advocate pointed out in his post-trial review that one court member, MSG Blackstone, was listed on Court-Martial Convening Order No. 371 as belonging to the same unit as the accused, *i.e.*, HHC, 2nd Battalion, 30th Infantry. Appended to the post-trial review, however, was a copy of attachment orders indicating that, as of 7 July 1981, MSG Blackstone was "permanently attached" to the U.S. Military Community Activity, Schweinfurt. Also appended was an affidavit from MSG Blackstone stating that he did not know the accused, and that he had, in fact, been serving with the U.S. Military Community Detachment since July 1980. His attachment to the Activity in

[1] 16 M.J. 678 (A.C.M.R.), *petition for review granted*, No. 48,051 (C.M.A. Apr. 9, 1984).

[2] Uniform Code of Military Justice art. 25(c)(1), 10 U.S.C. § 825(c)(1) (1982) [hereinafter cited as U.C.M.J.].

July 1981 was for the purposes of finance, SIDPERS, and administration of military justice. The only contact between MSG Blackstone and HHC, 2nd Battalion, 30th Infantry, was incidental; he administered Skills Qualification Tests (SQT) for the entire community, including that unit.

The staff judge advocate advised the convening authority that MSG Blackstone and Wilson, the accused, were not members of the same unit for the purpose of Article 25(c)(1) of the U.C.M.J. Trial defense counsel took issue with this conclusion in his rebuttal to the post-trial review and challenged the jurisdiction of the court.

On appeal, Wilson maintained that, notwithstanding MSG Blackstone's attachment to another unit almost five months before trial, and his informal attachment to another unit for an entire year prior to that, his membership on the panel created a jurisdictional defect. The government disagreed and urged the court to focus on the purpose and history of Article 25(c)(1) and conclude that following the literal language of that provision would be a disservice to the military justice system. In response, the court issued an order directing the government to answer numerous questions about MSG Blackstone's service during the period in question. Affidavits, copies of attachment orders, an extract of MSG Blackstone's DA Form 2475-2 (Personnel Data Card), maintained by Wilson's company, and instructions for SQT administration were submitted to the court.

The government argued that despite the literal language ostensibly disqualifying any enlisted person who is a "member of the same unit" as the accused from eligibility for court membership, there are compelling policy reasons for construing such a limitation in light of the facts peculiar to the *Wilson* case and in light of the legislative purpose behind the disqualification.

While Wilson argued essentially that the disqualification is designed to protect the accused as well as the integrity of the military justice system, and that the substitution in 1950 of the phrase "member of the same unit" for "assigned to the same unit" created an extension of the disqualification, his arguments were not supported by the legislative history of Article 25.[3] The better view of this particular provision of the U.C.M.J. is the one contained in Judge Mahoney's cogent dissent in *Anderson*.[4]

At the time of trial, Anderson was assigned to the 341st Security Police Squadron, one of several squadrons included in the 341st Security Police Group. One of the court members, a chief master sergeant, was listed on the appointing orders as assigned to the 341st Security Police Group. He had been assigned to the 341st Security Police Squadron for several years, but at the time of trial he was "nominally assigned" to the 341st Security Police Group staff and was working, in fact, as a staff member. Even though nominally assigned to the Group staff, he was attached to the accused's unit, the 341st Security Police Squadron, for administrative and disciplinary purposes, including the administration of military justice. All staff members were attached to the squadron for these purposes. The majority found that an individual attached to a squadron for administrative and disciplinary purposes was a member of the unit for other purposes under the U.C.M.J., including Article 25(c). They held that the panel which tried Anderson was jurisdictionally defective.

It is evident from Judge Mahoney's analysis that the specific provision at issue here was designed to protect the command structure and the military justice system. Any benefits the accused may derive from the disqualification of enlisted members of the accused's own unit are purely ancillary. Judge Mahoney's view is amply supported, as he demonstrates in his opinion, by the legislative history of Article 25, and is easily reconciled with *United States v.*

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[3] *See Anderson*, 10 M.J. 803; United States v. Brown, 10 M.J. 589 (N.C.M.R. 1980); United States v. Scott, 25 C.M.R. 636 (A.B.R. 1958).

[4] *Anderson*, 10 M.J. at 805-19 (Mahoney, J., dissenting).

Scott[5] and *United States v. Tagert.*[6] The driving force behind the disqualification was a desire to limit the accused's right to enlist members in situations of military exigencies where only members with whom he or she is closely associated are available. In such a case, a convening authority would be forced to accede to a form of "court packing" by the accused.[7] Wilson suggested, however, that the accused, fearful of unlawful command influence if the convening authority details to the court only those enlisted members deemed most loyal to the command, might hesitate to request trial by enlisted members. However, this line of reasoning collapses under closer scrutiny.

First, the accused always runs the risk, in a sense, that the enlisted members detailed for the court-martial will identify with the command's interest in law and order and thus will be sympathetic to the prosecution. Second, while a proscription against enlisted members belonging to the *accuser's* unit was contemplated at one time, there is no prohibition against such a member serving. Rather, that member is subject to the same *voir dire* and challenge procedures to which all members are subject. Thus, with no automatic prohibition against an enlisted member belonging to the accuser's unit, the relationale Wilson advanced with regard to the dual purpose of Article 25(c)(1) vanishes.[8] Third, the distinction between an "incompetent" service member and an "ineligible" service member has not been lost in the legislative history.[9] The operative word "ineligible" suggests that the "cloak of ineligibility" may in some cases be lifted.[10] Thus, while a member may be ineligible to serve on a court at a particular point in time, events and circumstances may warrant, as they did here, a determination that the ineligibility either ceased and did not prejudice the accused's interests, or was waived altogether. For example, a service member assigned to the accused's unit prior to being detailed as a court member, but who is otherwise assigned at the time of appointment to the court-martial, is not automatically ineligible to serve. He or she is merely subject to *voir dire* and challenge.

In the context of *Wilson*, it was apparent that MSG Blackstone and Wilson were total strangers. It would be illogical at best, and a deification of form at worst, to disqualify an enlisted member who has no contact with the accused's unit and who does not identify with it, and yet not automatically disqualify a member of the *accuser's* unit in a given case. Further, an analysis of the facts based on "assignment," "attachment," and SIDPERS documents, while helpful, is not dispositive.[11] Such an analysis may ignore the concerns of the U.C.M.J. provision is designed to bring to the fore: close personal or professional association between the accused and a potential court member and the possible subversion of the court-martial system. Therefore, a meaningful analysis focuses on the facts and circumstances of the particular court member's military service as they relate to the accused and the accused's unit.

In *Wilson*, the Army Court of Military Review stated;

> Had the framers of the UCMJ intended assignment to a unit as the unconditional test of eligibility, they could have modeled Article 25 (c)(1) on its precursor, Article of War 16, Selective Service Act of 1948, Title II, §§ 212, 62 Stat. 630 (1948) (formerly codified at 10 U.S.C. §§ 1487), which specifically stated that enlisted members "assigned to the same company or corresponding military unit" were not eligible to serve. That they did not indicate to us a dissatisfaction with the mechanistic

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[5]25 C.M.R. 636 (A.B.R. 1958) (enlisted court members from same unit as accused was not a jurisdictional defect; defect disclosed on appointing order was waived by failure to object).

[6]11 M.J. 677 (N.M.C.M.R. 1981) (accused waived any objection to member of court-martial who was from same unit as accused by his complete and open acceptance of member).

[7]*Anderson*, 10 M.J. 813-19 (Mahoney, J., dissenting).

[8]*Id.* at 811-18 nn.16, 29 & 33 (Mahoney, J., dissenting).

[9]*Id.* at 818 n.43 (Mahoney, J., dissenting).

[10]United States v. Beer, 6 C.M.A. 180, 19 C.M.R. 306 (1955). *Accord Scott*, 25 C.M.R. 636.

[11]*See e.g.*, United States v. Perry, 20 C.M.R. 562 (C.G.B.R. 1955).

approach taken by the Boards of Review in interpreting Article of War 16. *See e.g., United States v. White*, 2 CMR(AF) 845 (1950); *United States v. Quimbo*, 2 BR/JC 297 (1949).[12]

The court went on to observe that, between 8 December 1979 and the date of Wilson's trial, MSG Blackstone "performed no company duties in that unit. He did not stand company formations, he did not muster with the company and he was assigned no rostered duties with the company."[13] The court extensively detailed MSG Blackstone's performance of duties at locations other than Wilson's unit for purposes unrelated to Wilson's supervision or his unit's mission. Thus, the court held that, under the circumstances, MSG Blackstone was not disqualified under Article 25(c)(1) of the U.C.M.J. from serving as a member of Wilson's court-martial.

In his dissent, Senior Judge Melnick took issue with this conclusion, believing that a strict test of "membership" was involved.[14] In concluding that MSG Blackstone remained a member of Wilson's company, he relied on the fact that MSG Blackstone was merely "borrowed" from his tactical unit and could not be actually assigned to the Community Activity due to insufficient personnel spaces.

The majority also addressed the question of waiver, adopting the government's argument that a passive waiver was applicable because any disqualification from membership is personal in nature and not by reason of incompetence due to status or lack of professional qualifications. Moreover, an affirmative waiver was not required because the same information available to the prosecution was available to the defense, and the parties themselves are in the best position to evaluate potential prejudice arising from unit membership.[15]

The dissent also took issue with the majority's disposition of the waiver issue. However, the dissent's position is premised on the fact that none of the parties at trial identified the unit membership issue and thus there is "no reason to hold defense counsel here to a higher standard than that applied to the military judge, the trial counsel, or the Staff Judge Advocate."[16] In the absence of an affirmative waiver, Senior Judge Melnick would have treated the disqualification as controlled by those cases in which an improperly appointed court member sits for the trial or a challenge is erroneously denied, *i.e.*, the court is tainted and the defect is fatal to both findings and sentence.[17] Presumably, this conclusion is meant to apply only to contested cases and not to those in which the accused pleads guilty and is then sentenced by court members. In such a case, the defect affects only the sentence.[18]

Wilson represents an interesting excursion into the world of congressional intent. The majority here recognized the policies behind Article 25(c)(1) of the U.C.M.J. and the goals it is designed to serve. Moreover, no one can say—and Wilson did not suggest—that MSG Blackstone's membership on the court precluded a fair trial.

Although this particular fact situation does not arise frequently, *Wilson* could be argued by analogy in other cases in which it is claimed that a court member is disqualified. However, based on the disagreement among the members of the panel that decided *Wilson*, and the split of authority between the courts of military review, a conservative approach to this type of problem is required. The prudent trial counsel should identify and cause to be replaced court members who might be deemed disqualified on the basis of an official connection with the accused's unit. Note that although, in *Wilson*, the court found numerous factual circumstances that weighed in the government's favor, these factors might not be present to the same degree in every case.

Moreover, given the unsettled state of the

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[12] *Wilson*, 16 M.J. at 679.

[13] *Id.* at 680.

[14] *Id.* at 681 (Melnick, S.J., dissenting).

[15] *Id.* at 680.

[16] *Id.* at 682 (Melnick, S.J., dissenting).

[17] *See* United States v. Tucker, 16 C.M.A. 318, 36 C.M.R. 474 (1966).

[18] *Id.*

waiver doctrine as it applies here, it would be unwise to rely on a theory of passive waiver. A better approach, if the problem is identified but replacement of the court member is not feasible, *e.g.*, because of delays or possible mistrial, is to obtain the express consent of the accused for the court member to sit. On appeal, this would preclude a defense argument of general prejudice and would strengthen the government's position as argued in *Wilson.*

Automatic Data Processing Equipment Acquisition

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Introduction

The legislative foundation for the acquisition of all automatic data processing (ADP) equipment, services, and supplies by the U.S. Army began with the Federal Property and Administrative Services Act of 1949[1] and the Armed Services Procurement Act of 1947.[2] These two statutes and the regulations they spawned are familiar to all who work in federal procurement. Less well known but very important in ADP acquisitions are the Brooks Act of 1965[3] and the Warner Amendment of 1982.[4] The Brooks Act centralized the procurement of computers and related supplies and services by federal agencies in the General Services Administration (GSA). The Warner Amendment exempted certain types of acquisitions from GSA control. This article discusses the effect of the Brooks Act, related statutes, and the interplay of the applicable GSA, DOD and Army regulations in ADP acquisition.

GSA Requirements

While the Brooks Act applies to all ADP equipment, the GSA has limited the exercise of its acquisition power in the Federal Procurement Regulations (FPR)[5] and the Federal Property Management Regulations (FPMR)[6] to general purpose, commercially available, mass produced, ADP components. The GSA has, however, promulgated regulations concerning software even though the Brooks Act is silent on that matter.[7] FPR § 1-4.1100 sets out the policies and procedures for acquiring ADP equipment. The FPMRs establish policies for the management, acquisition, and utilization of ADP equipment, software, maintenance, and related services and supplies.[8]

There are essentially three ways federal agencies may procure ADP equipment covered by the Brooks Act: the GSA can acquire the equipment for the agency or with the agency's assistance;[9] the agency may acquire the item without GSA action if the acquisition falls below specific dollar thresholds;[10] or the agency

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[1]Pub. L. No. 81-152, 63 Stat. 378 (1949) (codified at 40 U.S.C. § 471 (1976)).

[2]Pub. L. No. 79-515, 60 Stat. 541 (1946). (current version at 10 U.S.C. § 2202 (1976)).

[3]Pub. L. No. 89-306, 79 Stat. 1127 (1965) (codified at 40 U.S.C. § 759 (1976)).

[4]Pub. L. No. 97-86, 95 Stat. 1117 (1981), *amended by* Pub. L. No. 97-295, 96 Stat. 1291 (1982) (codified at 10 U.S.C. § 2315 (1982)).

[5]41 C.F.R. § 1-4.11 (1983).

[6]41 C.F.R. § 101 (1983).

[7]41 C.F.R. § 1-4.11 (1983).

[8]41 C.F.R. § 101-35, 36 (1983).

[9]41 C.F.R. § 1-4.1106(a)(3)(1983).

[10]41 C.F.R. § 1-4.1104 (1983).

may be required to submit an Agency Procurement Request to GSA who will grant the agency a Delegation of Procurement Authority (DPA).[11] Failure to obtain a DPA when required is a fatal defect in the solicitation process which may result in the cancellation of a solicitation if it is protested.[12] The requirement for a DPA depends on the method of procurement, the item being procured, and whether the acquisition is characterized by GSA as competitive or noncompetitive.[13] For example, an agency may order equipment without a DPA by placing a purchase order against a GSA schedule contract, provided the order does not exceed the maximum ordering limitation of the contract and the total purchase price of the items ordered is not more than $300,000.[14] The agency may also proceed without a DPA in a competitive procurement if the purchase price does not exceed $2.5 million or if the basic monthly rental charges (including maintenance) do not exceed an annual rate of $1 million; in a sole source or specific make and model procurement, the purchase price may not exceed $250,000 or the basic monthly rental charges (including maintenance) may not exceed an annual rate of $100,000.[15] Even if ADP equipment is leased, the critical figure when using a GSA scheduled contract is the purchase price.[16] GSA defines a sole source requirement as a procurement where the government's requirements, as set out in the necessary specifications, are so restrictive that there is only one known supplier capable of satisfying the government's requirements.[17] Another type of sole source is where the procurement is based on a specific make and model number of ADP equipment. The mere existence of adequate price competition as defined in Defense Acquisition Regulation (DAR) § 3-807.7 is insufficient in ADP acquisition.[18] Even through there may be a number of dealers interested in an acquisition which requires equipment of a specific make and model number, this price competition does not meet GSA's definition of a competitive procurement.

DOD Policy

DAR § 4-1100 sets out the policy and procedures for DOD procurement of ADP. This section explicitly recognizes the authority of GSA to provide for the procurement of ADP by federal agencies. However, it also sets a substantial limitation on GSA authority in that GSA may not impair or interfere with the determination by individual agencies of their requirements. This section further states that GSA authority does not extend to procurement of ADP equipment specially designed as a weapon or space system, items specially designed for the government under a developmental contract, software related to the preceding two exceptions, contractor-acquired equipment, or ADP support systems. However, GSA does have authority to specify the procedures for contractor-acquired equipment in accordance with the FPR. If, however, there are conflicting regulations, GSA regulations apply.[19]

Army Regulations

Separate and distinct from the FPR and DAR requirements concerning ADP acquisition are the requirements in Army Regulations 18-1,[20] 1000-1,[21] 70-1[22] and draft Army Regulation 70-XX.[23] Before acquiring ADP equipment or

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[11] 41 C.F.R. § 1-4.1106(a)(2) (1983).

[12] Ms. Comp. Gen. B-202181, 4 Mar. 1982.

[13] 14 C.F.R. § 1-4.1101-7, .1101-8 (1983).

[14] 48 Fed. Reg. 37,031 (1983) (to be codified at 41 C.F.R. § 1-4.11, 12).

[15] *Id.*

[16] 41 C.F.R. § 1-4.1109-6(b)(2) (1983).

[17] 41 C.F.R. § 1-4.1102-7 (1983).

[18] 41 C.F.R. § 1-4.1102-8 (1983).

[19] 32 C.F.R. § 4-1106 (1983).

[20] U.S. Dep't of Army, Reg. No. 18-1, Army Automation Management (15 Aug. 1980) [hereinafter cited as AR 18-1].

[21] U.S. Dep't of Army, Reg. No. 1000-1, Basic Policies for Systems Acquisition (1 Jun. 1983) [hereinafter cited as AR 1000-1].

[22] U.S. Dep't of Army, Reg. No. 70-1, System Acquisition Policy and Procedures (1 Feb. 1984) [hereinafter cited as AR 70-1].

[23] U.S. Dep't of Army, Draft Reg. No. 70-XX, Battlefield Automated Systems (29 Apr. 1983) [hereinafter cited as draft AR 70-XX].

services, the approval authorities specified in those regulations must take action.

AR 18-1 can be best described as the Army's implementation of the Brooks Act. It sets out the responsibilities and delegates authority for the management of Army automation, and specifically applies to general purpose, mass produced ADP equipment. It does not apply to computer resources and systems developed by systems developers under the provisions of AR 1000-1 and the AR 70-series.[24] However, this exception does not include automation used for logistical support, software development, or project management of embedded computer resources. AR 18-1 also does not specially govern design systems or those physically incorporated into tactical weapon systems, space systems, or systems used by nonappropriated fund activities. In accordance with the DAR and the FPR, AR 18-1 also governs acquisitions by government contractors when the full lease cost of the equipment or services are paid by the government or when title will pass to the government. AR 18-1, its companion regulations, and the technical bulletins of the 18-series, set out the process of ADP acquisition from concept development through the design, system development, and deployment/operation phases. AR 18-1 references the FPR and DAR and sets out the life cycle policies.

The most important chapter in AR 18-1, chapter IV, sets out the classes of systems and their decision authorities. To determine the class of the system, the relative importance of the computer system and its development costs are the prime factors. As always, requirements may not be divided into separate projects to avoid dollar limitations.

Because the vast majority of ADP actions at the installation level fall into Class IV (between $100,000 and $3,000,000), its decision authorities will be discussed. MACOM commanders or their representatives may approve the competitive acquisition of ADP equipment not exceeding ten computers per requirement for general purpose use, the total cost of which does not exceed $300,000 purchase price or $100,000 annual lease.[25] MACOMs may also approve a competitive acquisition of ADP equipment dedicated to scientific or engineering applications when the total cost does not exceed $500,000 purchase price or $200,000 annual lease.[26] However, this does not apply to those systems which fall within the ambit of AR 1000-1 and the AR 70-series. When the annual cost of ADP support services does not exceed $500,000, MACOMS may approve the acquisition. Also, MACOM commanders can approve noncompetitive acquisitons which do not exceed $10,000 purchase price.[27] The Assistant Deputy Chief of Staff for Operations and Plans, Command, Control, Communications and Computers must approve noncompetitive purchases between $10,000 and $50,000 purchase price. The Assistant Secretary of the Army (IL&FM) must approve noncompetitive ADP purchases over $50,000.[28] MACOM commanders may also acquire maintenance services or ADP supplies without dollar limitation except that the FPR requires a DPA if the acquisition is over $200,000.[29]

The following acquisition example demonstrates the dual approval required, *i.e.*, the Army requirement of approval before acquisition under AR 18-1 and the requirement of a GSA DPA if the procurement exceeds a certain dollar amount. If an activity wishes to acquire administrative ADP equipment valued at $310,000 from a GSA schedule contract, the Assistant Secretary of the Army (IL&FM) would have to approve the acquisition pursuant to AR 18-1, and a DPA would have to be obtained from GSA in accordance with the FPR.

Only $70,000 of the authority delegated to MACOM commanders for competitive acquisitions may be redelegated to general officer commanders of major subordinate commands or to

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[24]AR 18-1, para. 1-2(b)(1).

[25]AR 18-1, para. 4-4.

[26]AR 18-1, para. 4-4(2).

[27]AR 18-1, para. 4-4(3).

[28]Message, HQDA, DAMO-C4Z-K, 232040Z Feb. 84, subject: Noncompetitive Procurement of ADPE.

[29]41 C.F.R. § 1-411 (1983).

Executive Schedule heads of subordinate agencies. ADP acquisition authority not delegated to MACOM commanders is retained by the ASA (IL&FM).[30] Paragraph 4 of AR 18-1 states that the authority to acquire administrative systems is vested in The Adjutant General. Therefore, the AR 340-series must be used to determine approval procedures and dollar thresholds for those systems. Worthy of note is the fact that high speed laser printers, although used for ADP purposes, have been deemed to be print plants and must be acquired in accordance with AR 340-8.[31]

For major materiel systems, AR 1000-1 sets out the basic policy for systems acquisitions, including ADP resources that are integral to or in direct support of battlefield systems. Computer resources which are "integral" to a battlefield system are those that are both dedicated and essential to the specific functional tasks for which the higher order system was designed. "Direct support" includes functions such as specialized training, testing, or software support which are dedicated to the operation or maintenance of the system throughout its life cycle.[32] AR 1000-1 used to describe the acquisition of ADP equipment in detail; the current AR 1000-1 does not go into much detail.

The acquisition of ADP will be significantly changed in the near future by pending changes in both the acquisition and management arenas.

The FAR

Federal Acquisition Regulation (FAR) part 39 will cover the management, acquisition, and use of information resources. At this time, however, that section is reserved and reference is made to 41 C.F.R. § 150, the present GSA FPR and FPMR regulations which contain the guidance, policies, and procedures peculiar to ADP telecommunications and related resources, acquisition, or management.[33]

The DOD supplement to the FAR is found at part 70. This section has separate subparts which address the acquisition of ADP when the procurement authority is vested in the GSA, falls within the provisions of the Warner Amendment, or when the acquisition does not fall within the scope of either of these authorities.[34] Subpart 70.2 contains definitions which apply only to acquisitions within the scope of part 70. Certain definitions which had appeared at DAR § 4-1100 have been deleted and a substantial number have been added. Subpart 70.3 discusses the acquisition of computer resources when the GSA has authority under the Brooks Act to require a DPA, including the dollar thresholds for the requirement of a DPA that presently appear in GSA Temporary Regulation 71. Generally, this section parallels DAR § 4-1100; however, it goes into more detail about the submission of an Agency Procurement Request.[35] FAR subpart 70.322, which covers the exchange or sale of ADP equipment, is a major departure from the present DAR rule. This section includes the DOD procedures to implement the government-wide reutilization program. ADP equipment may be transferred to the contractor, *i.e.*, exchanged, in return for a trade-in allowance toward the purchase of new ADP equipment. Additionally, ADP equipment may be sold to another government agency and the proceeds applied to the purchase of new ADP equipment. There are conditions, however, which must be met before an exchange or sale may be considered. The ADP systems must be needed to satisfy a continuing ADP requirement, *i.e.*, the system must be validated. Also, the ADP system to be sold or exchanged must be similar to the ADP item being acquired, except in situations where the lesser or greater number of systems to be acquired perform substantially all the functions which the trade-in system would have otherwise performed. Additionally, a written administrative determination must

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[30]AR 18-1, paras. 2-2(b)(3), 4-4(4).

[31]U.S. Dep't of Army, Reg. No. 340-8, Army Word Processing Program (IC1 30 Nov. 1982).

[32]U.S. Dep't of Army, Reg. No. 1000-1, Basic Policies for Systems Acquisition (1 May 1981) (rescinded on 1 Jun. 1983).

[33]48 C.F.R. § 1-39 (1984).

[34]DOD FAR Supp. part 70.1 (1984).

[35]DOD FAR Supp. part 70.3 (1984).

be made by the selling or exchanging activity that the exchange allowance or the proceeds of the sale will be applied toward acquiring the replacement ADP equipment, and that the exchange or sale will foster the economical and efficient accomplishment of the procurement.[36] Until part 39 of the FAR is published, FPR § 1-4-1100 and FPR subparts 35 and 36, together with part 70 of the DOD supplement to the FAR, will govern ADP acquisitions.

Another significant change in FAR part 70 is the recognition that certain acquisitions do not fall under the Warner Amendment or the Brooks Act.[37] Generally, these are computer systems and components which have been modified to meet government specifications, cannot be used to process a variety of problems or applications because of their special design or which can only be used as an integral part of a noncomputer system. Additionally, acquisitions by DOD contractors, acquisitions of printing services utilizing computer technology, *e.g.*, high speed printers, and acquisitions of computers as an integral part of a noncomputer system in computer support systems fall within the scope of these excepted acquisitions.[38] The policies and procedures for these excepted acquisitions are contained in DOD FAR Supplement subpart 70.6 and FAR part 8.8 or FAR subpart 70.5.[39]

New Developments

While acquisition regulations are changing, management regulations are also being modified. The recently revised AR 70-1, Army Systems Policy and Procedures, states that embedded computer resources, used either as a complete system or as part of a system, are not governed by AR 70-1, they will be covered in the new AR 70-XX, Battlefield Automated Systems.[40]

Further, if nondevelopmental ADP equipment and software is to be used in a fixed or mobile configuration at any echelon, except weapons systems computers, the U.S. Army Computer Systems Selection Acquisition Agency will be responsible for the acquisition.[41] This could effectively eliminate the ability of local procurement activities to respond to research and development activities Army-wide.

The draft of the new AR 70-XX, Battlefield Automated Systems, has been staffed. It will probably apply to computer system resources, software products, and development of software used for battlefield automated systems. AR 70-XX would, in effect, be the management parallel of DAR 4-1100.2 and DOD FAR Supplement subpart 70.101(b)(4) and state that there will be no GSA involvement in the acquisition of battlefield automated systems. From the management aspect, the procedures in AR 70-XX will be used, including a computer resource management plan, instead of AR 18-1 and its system of approvals.

Recent DOD guidance severely restricts leasing ADP equipment.[42] Reacting to congressional concern about the economy of leased ADP equipment, DOD has, in fact, stopped all leasing of ADP equipment. Currently, leased ADP equipment must be purchased or removed within the next five years. Congress has provided a $150 million Industrial Fund this fiscal year to initiate buyouts. Exceptions may only be granted on a case-by-case basis by senior information resource management officials or their designees.[43]

Conclusion

In the final analysis, it is an understatement to describe ADP equipment acquisition as regulated. However, in view of the increasing importance of this resource to the Army, contract lawyers must become familiar with the additional requirements of the acquisition and management regulations which govern this dynamic area of the law.

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[36]DOD FAR Supp. part 70-322 (1984).

[37]DOD FAR Supp. part 70-101(c) (1984).

[38]DOD FAR Supp. part 70-101(c)(2) (1984).

[39]DOD FAR Supp. part 70-101(c)(2) (1984).

[40]AR 70-1, pg. i.

[41]AR 70-1, para. 2-27.

[42]Message, HQDA, DAMO-C4P-A, 131910Z Dec. 83, subject: Congressional Action on Acquisition of ADPE.

[43]*Id.*

The Resurgent Doctrine of Waiver

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Recent decisions by both the Court of Military Appeals and the courts of military review have given the doctrine of waiver renewed emphasis.[1] In view of this trend, it is incumbent upon the military practitioner to become fully aware of the ramifications of failing to make the applicable motions or objections at each step of the trial process in a timely and specific manner.[2] This article is intended as a broad review of recent cases which have addressed the issue of waiver.[3] It is hoped that this recapitulation of recent developments regarding waiver will serve as a practical guide to counsel in identifying potentially crucial issues in the trial process and taking necessary steps to preserve those issues for appellate review.

Pretrial

Pretrial Agreements

A plea of guilty waives all evidentiary issues associated with the charge(s) to which an accused admits.[4] In the past, inventive defense counsel tried to evade this broad rule of waiver by drafting pretrial agreements which purported to allow an accused to plead guilty to a certain charge or charges while preserving the related evidentiary issues for appellate review.[5] This innovative practice was squarely addressed in *United States v. Mallet.*[6] In *Mallet,* the appellant pled guilty to a violation of a lawful general regulation by wrongfully possessing phencyclidine. The appellant entered into a pretrial agreement which provided that appellate review of the search and seizure issues in the case would not be foreclosed by the plea of guilty. However, the Army Court of Military Review ruled that this provision was of no effect and that all fourth amendment issues in the case were waived by the appellant's plea of guilty.[7] Moreover, under the particular facts of the *Mallet* case, the court found that the appellant's plea was provident despite its ruling.[8]

The clear lesson of *Mallet* is that the opposing parties at trial may not alter by mutual agreement the Military Rules of Evidence which dictate that waiver occurs when a plea of guilty is entered. One strategem which has been suggested to avoid the result of *Mallet* is the use of confessional stipulations. In a confessional stipulation, the accused enters a plea of not guilty to the charge or charges but then stipulates either orally or in writing, the facts which constitute the essential elements of the offense or offenses

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[1]For a general overview of Chief Judge Robinson O. Everett's view on the role of appellant courts, *see* Everett, *Some Comments on the Civilianization of Military Justice* The Army Lawyer, Sep. 1980, at 1.

[2]*See* Manual for Courts-Martial, United States, 1969 (Rev. ed.) Military Rules of Evidence 304(d)(5), 311(i), 103(a) [hereinafter cited as M.R.E.].

[3]*See* Wasinger, *The Doctrine of Waiver,* 39 Mil. L. Rev. (1968) for an excellent and comprehensive treatment of the doctrine of waiver.

[4]*See* M.R.E.s 304(d)(5), 311(i), and 321(g). A plea of guilty, moreover, waives *all* evidentiary issues associated with it, not only those based on the Constitution. *See* United States v. Robinson, 14 M.J. 903, 907 (N.M.C.M.R. 1982) (a plea of guilty also waives all equal protection issues associated with the charges to which an accused pleads guilty: "We see no logical reason why the doctrine of waiver set forth in M.R.E. 311(i), which by its terms applies to any Fourth Amendment issue raised under M.R.E. 313, should not also apply to an equal protection issue raised under the same rule. We treat the appellant's plea of guilty to the marijuana possession offense as a waiver of his right to pursue on review an equal protection attack on the inspection order as it affects that offense."). For an excellent discussion on the extent of waiver resulting from a plea of guilty, *see* Note, *Issues Waived by Provident Guilty Plea,* 13 The Advocate 354 (Sept.—Oct. 1981); Vitaris, *The Guilty Plea's Impact on Appellate Review,* 13 The Advocate 236 (Jul.—Aug. 1981) and the cases cited therein.

[5]*See* United States v. Higa, 12 M.J. 1008 (A.C.M.R. 1982).

[6]14 M.J. 631 (A.C.M.R. 1982).

[7]*Id.* at 632.

[8]*Id.* (the pretrial agreement made it clear that appellant would enter his guilty plea with the full understanding that the condition might not be accepted by the appellate courts).

alleged by the government.[9] The advantage of this arrangement is that it may preserve appellate issues associated with the offense or offenses admitted if the issues are raised in a timely manner as required by the Military Rules of Evidence.[10] At the same time, the accused presents a somewhat contrite demeanor to the court which may be translated into a lighter sentence.

The disadvantage of a confessional stipulation, taken alone, is the lack of a guaranteed limitation upon any sentence which might be approved by the convening authority. In view of this drawback, it is unlikely that unconditional confessional stipulations will find favor with any but the most adventuresome of accuseds. However, a confessional stipulation used in combination with a pretrial agreement can be an attractive option for an accused.

In *United States v. Schaffer*,[11] the accused was charged with several offenses, including an unauthorized absence and the larceny of an automobile. He entered into a pretrial agreement wherein he agreed to plead guilty to the unauthorized absence and the lesser included offense of wrongful appropriation of the automobile. He further agreed to enter into a confessional stipulation setting forth the facts regarding those two charges. Although the accused's plea was found provident and accepted by the military judge, the government proceeded to use the stipulation in an attempt to prove the greater charge of larceny.[12] The court members, however, returned a finding of guilty only to the lesser charge of wrongful appropriation.

Had Schaffer been convicted of the larceny, he would have found himself in a relatively secure position. He would have still had the benefit of the negotiated sentence limitation because his pleas had been accepted, and, assuming his counsel made timely motions and objections, he may well have been able to preserve appellate issues stemming from a conviction for larceny.

Request for Individual Defense Counsel

The denial of individually requested defense counsel is another issue which must be thoroughly addressed before the trial commences. In *United States v. Gray*,[13] the Army Court of Military Review applied the doctrine of waiver when the appellant raised on appeal the issue of the convening authority's denial of his request for a particular defense counsel. The court ruled that the appellant's failure to exhaust all his administrative remedies from the convening authority's decision before trial began waived the issue on appeal.[14]

During Trial

Motions Prior to Entering a Plea

Motions relating to involuntary confessions, search and seizure issues, and eyewitness identification must be made prior to entering a plea or will most likely be waived. Such motions not made prior to the entry of a plea may not be made at a later time except as permitted by the military judge for good cause shown.[15] In *United States v. Gholston*,[16] the accused was convicted contrary to his pleas of, *inter alia*, assault on two sentinels in the execution of their

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[9] *See* United States v. Curry, 15 M.J. 701, 707-08 (A.C.M.R. 1983). "[T]here is no rule comparable to Mil. R. Evid. 304(d)(5) and 311(i) regarding confessional stipulations. . . . Since the Military Rules of Evidence do not preclude consideration of evidentiary issues after a confessional stipulation as they do after a guilty plea, these cases remain a valid judicial recognition of the proposition that appellate review of evidentiary issues is not foreclosed by a confessional stipulation." *Id.* at 708. *See also* United States v. Brown, 12 M.J. 420 (C.M.A. 1982).

[10] *See* M.R.E.s 103(a)(1), 304(d)(2), 321(c)(2); R.C.M. 705.

[11] 12 M.J. 425 (C.M.A. 1982).

[12] *Id.* at 426-27.

[13] 14 M.J. 816 (A.C.M.R. 1982).

[14] *Id.* at 818 ("We also note that the record does not reflect an appeal from the general court-martial convening authority's decision regarding the availability of Captain Shaffer. In the absence of an appeal, the appellant is not entitled to judicial relief even if the general court-martial convening authority's decision was incorrect. United States v. West, 13 M.J. 800 (A.M.C.R. 1982."). *But cf.* United States v. Brewer 15 M.J. 597 (A.C.M.R. 1983) (failure by military judge to establish a knowing waiver by appellant of right to conflict-free counsel results in reversal).

[15] M.R.E.s 304(d)(2)(A), 311(d)(2)(A), 321(c)(2)(A).

[16] 15 M.J. 582 (A.C.M.R. 1983).

duties. On appeal, he contended that his conviction for assaulting the sentinels was tainted by the admission into evidence of an unlawful pretrial showup at which the accused was identified by one of the victims.

While first noting that the identification was not so tainted as to result in an irreparably mistaken identification, the court went on to apply waiver because the accused failed to object to the admission of the questioned evidence at trial: "[A]ssuming it was error to admit such evidence, appellant's failure to object to its admission constitutes waiver. Mil. R. Evid. 321(c)(2)(A)."[17] Practitioners must also be aware that when they make suppression motions, appellate courts expect them to do so with specificity. In *United States v. Brown*,[18] the appellant sought to expand upon a suppression motion which he had unsuccessfully litigated at trial. At trial, Brown had attempted to suppress certain evidence produced by a search which he argued lacked probable cause. On appeal, he broadened the motion to argue that the authorizing official who gave permission for the search was not the proper official empowered to issue such authorization. The Air Force Court of Military Review ruled that all issues other than those specifically raised in the original motion to suppress were waived:

> In the case at hand, all parties to the trial understood that the specific ground for the motion to suppress was that there was insufficient probable cause upon which to authorize a search. None of the parties sought to litigate the authority of authorizing official, and it was not mentioned by the defense except in passing. Further, after the military judge had made his ruling on the stated objection, the defense counsel stated there were no further objections to the evidence seized.[19]

Motions to dismiss charges because of multiplicity must also be made prior to the entry of a plea. Failure to do so will usually result in waiver of such issues on appeal unless to do so would cause a "miscarriage of justice," "impugn the reputation and integrity of the courts," or amount to "a denial of a fundamental right of the accused."[20] In theory, this general rule appears simple enough to apply, but recent cases involving the failure of defense counsel to object to multiplicious charging, or of military judges to *sua sponte* dismiss multiplicious charges, demonstrate the difficulty in applying general rules to individual cases.

In *United States v. Gibson*,[21] the appellant was tried before a military judge alone and convicted, contrary to his pleas, of both attempted rape and assault with attempt to commit rape. As the court noted: "[T]he judge did not dismiss either charge, nor was he requested to do so by defense counsel."[22] The military judge did, however, find the charges multiplicious for sentencing purposes. Despite the military judge's *sua sponte* motion, the court found that the appellant had been prejudiced by the multiplicious charging.[23] The court reversed and returned the case to The Judge Advocate General of the Navy for remand to the Navy-Marine Corps Court of Military Review. The court further ordered either setting aside the punitive discharge that had been adjudged at the trial level or a rehearing on the sentence.[24]

Since *Gibson*, a series of cases have been decided which offer an analytical framework with which to view *Gibson*. In *United States v. Huggins*[25] and *United States v. Tyler*,[26] a different result was obtained in the face of a defense failure to object to multiplicious charging. In

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[17] *Id.* at 584.

[18] 13 M.J. 810 (A.F.C.M.R. 1982).

[19] *Id.* at 811.

[20] *See* United States v. Sims, 617 F.2d 1371, 1378 (9th Cir. 1980); United States v. Kilburn, 596 F.2d 928, 935 (10th Cir.), *cert. denied*, 440 U.S. 966 (1979).

[21] 11 M.J. 435 (C.M.A. 1981).

[22] *Id.* at 436.

[23] *Id.* at 437 (when a sentence is imposed for what purports to be two separate and serious crimes—even through the trained legal mind may recognize that they are one and the same—there will be some tendency to be more severe than if clearly there is to be only one single offense to be punished).

[24] *Id.* at 438.

[25] 12 M.J. 657 (A.C.M.R. 1981).

[26] 14 M.J. 811 (A.C.M.R. 1982).

Huggins, the appellant was convicted pursuant to his plea of three specifications of larceny. On appeal he argued that the larceny charges were multiplicious and should have been dismissed by the military judge. While agreeing with the appellant that the charges were, as a matter of law, multiplicious, the court nonetheless ruled that since the trial defense counsel had not objected to the multiplicious charging, "the multiplicity for findings is waived."[27] Moreover, since the appellant had been tried by a special court-martial and the sentence for one larceny was the same as for three, the appellant's plea had not been rendered improvident because of a substantial misunderstanding of the maximum sentence.[28] The *Huggins* court did find, however, that the military judge's sentencing instructions were erroneous and that this error was not waived by the trial defense counsel's failure to object. The prejudicial impact of the military judge's sentencing instructions, however, was deemed to have been cured by the lenient sentence the appellant received because of his pretrial agreement.[29]

In *Tyler*, the appellant pled guilty to unlawful entry, indecent assault, and communicating a threat on one date, plus housebreaking, two assaults consummated by batteries, communication of a threat, and rape, each of which occurred on another date. On appeal, the appellant argued for the first time that the charged offenses were multiplicious. The Army Court of Military Review quickly distinguished *Gibson*, saying of that case: "The two charges were, at their core, precisely identical, and the full scope of *Gibson's* criminal conduct could be totally, accurately and fairly described by either one or the other charge."[30] Pointing out that the appellant had elected trial by military judge alone, and that before any plea is accepted a detailed factual inquiry must be conducted by the military judge, the court stated: "[T]o rule upon the issue of multiplicity, the trial judge would need to be fully apprised of all of the facts. Being so apprised, it seems to matter little or not at all on the issue of prejudice at a bench trial when or even whether he dismisses some of the charges on the ground of multiplicity."[31]

In *United States v. Smith*, a decision issued several days prior to *Huggins*, the Army Court of Military Review analyzed *Gibson* in some detail and stated that it "did not believe that *Gibson* intended to set a rule of general prejudice if multiplicious findings were not dismissed prior to sentencing."[32] Further, the court stated that it did not "believe that *Gibson* requires a multiplicious specification be dismissed even in the absence of a defense request at trial."[33] The court went on to set forth what it believed to be the limits of *Gibson:* first, in *Gibson*, the charges, which appeared on the surface to be separate and serious, were in face one and the same; second, the charges had been contested; and third, the "'unusual circumstance' of that case which along with the appellant's youth, induced the military judge to recommend that suspension of the punitive discharge be considered."[34] In light of *Smith*, the decisions in both *Tyler* and *Huggins* are logical.

In addition to making timely motions to dismiss multiplicious charges at the outset of the trial, defense counsel must be alert to renew unsuccessful motions as circumstances dictate. In *United States v. Curry*, the trial defense counsel unsuccessfully moved at the outset of the trial to consolidate nine separate conspiracy specifications into one specification.[35] The military judge denied the motion but gave the defense counsel leave to renew the motion after the evidence on the merits had been presented.

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[27] *Huggins*, 12 M.J. at 658.

[28] *Id.* at 659 ("We are satisfied that the pleas of guilty were not rendered improvident by any misunderstanding regarding the maximum punishment, since the maximum punishment was the same for one larceny or three, due to the jurisdictional limits of a special court-martial.").

[29] *Id.*

[30] *Tyler*, 14 M.J. at 812-13.

[31] *Id.* at 812.

[32] 12 M.J. 654, 656 (A.C.M.R. 1981).

[33] *Id.* at 656.

[34] *Id.* at 656-57. *See also* United States v. Gray, 14 M.J. 551 (A.C.M.R. 1982). *Cf.* United States v. McMaster, 15 M.J. 525 (A.C.M.R. 1982).

[35] 15 M.J. 701, 706 (A.C.M.R. 1983).

At the end of the government's case, however, the trial defense counsel failed to renew the motion. On appeal, the appellant contended that he was deprived of a fair trial by the fragmentation of a single conspiracy into nine specifications.

While agreeing with the appellant that there was indeed only one conspiracy,[36] the court went on to hold that the trial judge rightfully denied the trial defense counsel's motion to consolidate: "The facts of this case were sufficiently complex to justify the initial fragmented pleading as well as the military judge's deferral of the motion to consolidate until the supporting evidence was before him."[37] In view of the trial defense counsel's failure to renew the motion, the court applied waiver: "[T]he trial defense counsel's failure to make the motion to consolidate at the conclusion of the government's case constitutes a waiver of the defective pleading."[38] It is instructive to note that in its decision the court cited *Huggins*, in which the accused pled guilty, although *Curry* was a hotly contested case.

Irregular Pleas and Statutory Immunity

Appellate courts have been less than receptive to appellants who enter irregular pleas at trial and later base their appeals upon errors they contend that the military judge made by accepting their pleas. In *United States v. Shores*,[39] the court curtly dealt with one such appeal. The appellant was charged with, among other transgressions, the wrongful sale of marijuana in the hashish form. At trial he entered a plea by exceptions and substitutions to transfer of marijuana rather than sale. On appeal, he argued that the military judge erred by accepting this plea. The court had no difficulty resolving the issue against the appellant: "Since the defense proposed the irregular plea, any error in accepting it was waived. Furthermore, any error in permitting the irregular plea was invited by the appellant. Ordinarily, appellate courts will not grant relief for errors caused by granting a defense request."[40]

Similarly, an appeal based on immunity from prosecution will not be heard where the issue was not raised at trial. In *United States v. Gladdis*,[41] the appellant contended that the court-martial that convicted him of wrongful possession and use of heroin lacked jurisdiction over the charge and its specifications because the appellant enjoyed regulatory exemption from prosecution under the provisions of AR 600-85.[42] Noting that the appellant had not raised his objection at trial, the court stated, "Immunity is not a jurisdictional isue that may be raised at any time; rather it is a matter which, if not raised at trial, is waived."[43] The clear lesson to practitioners from *Gladdis* is to identify all grounds for regulatory immunity prior to trial and raise them before the entry of a plea.[44]

Objections During the Merits

Military Rule of Evidence (M.R.E.) 103(a) requires that counsel make timely and specific objections during the course of the trial in order to preserve issues for appellate review. Recent appellate decisions indicate that this rule significantly changed pre-M.R.E. practice.[45] In cases decided under the M.R.E.s, evidentiary issues not objected to at trial, or those objected to incorrectly, will be deemed waived in the absence of plain error.[46]

In *United States v. Shelwood*,[47] the appellant contended that certain government documents accepted into evidence after findings for purposes of aggravation of sentence were inadmis-

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[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] 16 M.J. 546 (A.C.M.R. 1983).

[40] *Id.* at 547.

[41] 12 M.J. 1005 (A.C.M.R. 1982). *See* United States v. Mika, 17 M.J. 812 (A.C.M.R. 1984).

[42] U.S. Dep't of Army, Reg No. 600-85, Alcohol and Drug Abuse Prevention and Control Program (1 May 1976).

[43] *Gladdis*, 12 M.J. at 1007.

[44] *See* United States v. Stallard, 14 M.J. 933 (A.C.M.R. 1982).

[45] *See* United States v. Kline, 14 M.J. 64, 66 (C.M.A. 1982); United States v. Jessen, 12 M.J. 122, 125 (C.M.A. 1981).

[46] M.R.E. 103(a), (d).

[47] 15 M.J. 222 (C.M.A. 1983).

sible in that they failed to comply with the applicable Navy regulation. At trial, the trial defense counsel objected to the documents on the grounds that they were hearsay and amounted to a denial of due process; he never specifically said that the documents failed to comply with the Navy regulation.[48] The court did not invoke the doctrine of waiver, but in a footnote said pointedly:

> Under the new Military Rules of Evidence, not in effect at the time of appellant's trial, trial defense counsel's failure to identify the specific ground of the objection might have precluded review of this issue. Mil. R. Evid. 103(a)(1) and (d). However, in accordance with our more paternalistic, pre-MRE practice, we deem trial defense counsel's timely objection sufficient to preserve the issue for appeal.[49]

In *United States v. McGary*,[50] a clear signal was sent to the practitioners that prior paternalistic practices had ended. In this case, waiver was applied to a failure to object to a foundational defect in documents offered into evidence by the government.[51] Similarly, in *United States v. Plissak*, waiver was applied to a failure to object to the introduction of a letter of reprimand into evidence.[52]

Failure to make a sufficiently specific objection to a government laboratory report waived the issue of the document's admissibility on appeal in *United States v. Foust*,[53] while in *United States v. Hancock*,[54] an incorrect objection to a government document was deemed to have waived consideration of the issue on appeal. In *Hancock*, the government sought to prove a prior conviction of the appellant by introducing into evidence a promulgating order and a DA Form 2-2. The trial defense counsel did not object to the DA Form 2-2, but did object to the promulgating order citing its cumulative nature.[55] On appeal, the court noted that the defense should have objected to the order because of its lack of finality rather than its cumulative nature; because no plain error was found, the court invoked waiver.[56]

Similarly, in *United States v. Akers*,[57] the appellant contended that the military judge erred by admitting into evidence a record of a civilian conviction which occurred after the date of the offenses for which the appellant was tried. The trial defense counsel objected to the conviction on the basis of inadequate foundation; he never objected to the document because of its date. Finding no plain error, the court invoked waiver.[58]

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[48] *Id.* at 224 (trial defense counsel objected on the grounds of hearsay and that such administrative type entries amount to a denial of due process of the accused, and at this stage of the proceedings that such entries are now sought to be submitted before this court in aggravation in a manner in which they can increase the possible punishment awarded to the accused and that this amounts to a denial of the accused's due process rights).

[49] *Id.*

[50] 12 M.J. 760 (A.C.M.R. 1982).

[51] In *McGary*, the appellant objected on appeal for the first time that a DA Form 2627 admitted at trial was defective in that Block 8 of the form failed to reflect a legal review by a staff judge advocate. The court stated, "[P]roof of the required legal review is necessary to lay a proper foundation for the document. Absence of such proof is a foundational defect... and waivable by failure to object." 12 M.J. at 762.

[52] 15 M.J. 767 (A.F.C.M.R. 1983).

[53] 14 M.J. 830 (A.C.M.R. 1982). On appeal, the appellant argued that a laboratory report which had been used to convict him of charges of wrongful possession and transfer of marijuana in violation of Article 134, Uniform Code of Military Justice had been improperly admitted because he was unable to cross-examine the chemist who had prepared the report. At trial, however, the trial defense counsel had only objected to the reports on chain of custody, relevancy, and hearsay grounds. As the court noted, the trial defense counsel "never requested him [the chemist] as a witness nor did he claim that the chemist's absence from trial made the documents inadmissible." *Id.* at 832. *Cf.* United States v. Davis, 14 M.J. 847, 848 (A.C.M.R. 1982) (trial defense counsel specifically objected to the admissability of a laboratory report and sought to have the chemist produced at the trial, averring that he had spoken to the chemist and that cross-examination would show that the chemist had not used the most reliable testing procedures and that the known standard had never been authenticated).

[54] 12 M.J. 685 (A.C.M.R. 1981).

[55] *Id.* at 686.

[56] *Id.*

[57] 14 M.J. 768 (A.C.M.R. 1982).

[58] *Id.* at 770.

Plain Error

It is clear from these decisions that practitioners should have a working understanding of what constitutes plain error within the meaning of M.R.E. 103(d). In *United States v. Beaudion*,[59] the Army Court of Military Review defined plain error within the meaning of the rule to be a mistake of such gravity as to "cause a miscarriage of justice," "impugn the reputation and integrity of the courts," or "amount to 'a denial of a fundamental right of the accused.'"[60]

In *United States v. Dyke*,[61] the court found plain error and refused to apply waiver where a DA Form 2627 lacking any signature whatsoever had been admitted into evidence without any objection from the defense. After first satisfying itself that *Dyke* had been prejudiced by admission of the document, the court stated:

> [A] purported record of nonjudicial punishment which has no signature whatsoever . . . is such a deviation from customary practice that to receive it into evidence constitutes plain error. Although the Military Rules of Evidence were intended to place additional responsibility upon trial and defense counsel, we do not believe they were meant to provide a license for slipshod performance by military judges.[62]

In *United States v. Robinson*,[63] the Army Court of Military Review found plain error in the admission of potent government hearsay evidence. In *Robinson*, the government introduced a damaging out-of-court statement by the appellant's co-accused. The declarant had been advised by his own counsel to invoke his privilege against self-incrimination and the government offered his prior statement under M.R.E. 804(b)(3). The only objection made to the statement by the trial defense counsel was that the declarant was available to testify. In a hearing on the objection, the military judge ruled that the declarant was indeed unavailable and accepted the statement in evidence. On appeal, the accused argued for the first time that the hearsay statement violated his sixth amendment right of confrontation in that it was not supported by "independent indicia of reliability."[64] The court refused to apply waiver under these circumstances:

> [W]e will not apply waiver in cases of plain error. Mil. R. Evid. 103(d). We hold that this case involves plain error. [The declarant's] testimony was critical to the prosecution and devasting to the defense. To apply waiver simply because the trial defense counsel objected on the wrong ground would be manifestly unfair in this case.[65]

In none of these cases does the practitioner find a working definition of the term "plain error." Also, commentators and appellate courts offer few concise definitions of the term. In his treatise on the Federal Rules of Evidence, Professor Berger and Judge Weinstein quoted another commentator who wrote, "[T]he cases give the distinct impression that 'plain error' is a concept appellate courts find impossible to define, save that they know it when they see it."[66] Professor Berger and Judge Weinstein do, however, cite several factors which courts will examine when testing for the presence of plain error, including the facts of the particular case, the gravity of the offense, the probable effect of the error, the number of errors committed during the trial, the closeness of the factual disputes, whether the evidence in question is related to a material fact, the instructions given, whether the evidence corroborated with testimony, and the reliance of counsel on the tainted evidence in their arguments.[67]

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[59] 11 M.J. 838 (A.C.M.R. 1981).

[60] *Id.* at 840.

[61] 16 M.J. 426 (C.M.A. 1983).

[62] *Id.* at 427.

[63] 16 M.J. 766 (A.C.M.R. 1983).

[64] *Id.* at 767.

[65] *Id.* at 768.

[66] 1 M. Berger & J. Weinstein, Weinstein's Evidence 103-70 (1982) (quoting 3 C. Wright, Federal Practice and Procedure-Criminal § 856 (1969)).

[67] M. Berger & J. Weinstein, *supra* note 66, at §§ 103-61, -62, -71, -72.

In *United States v. Webel,* the Court of Military Appeals defined plain error by quoting language from *United States v. Sims:* "Plain error is not the equivalent of obvious error. Rather, plain error is only found in exceptional circumstances where the reviewing court finds that reversal is necessary to preserve the integrity and reputation of the judicial process, or to prevent a miscarriage of justice."[68]

Thus, the determination of whether or not plain error exists in a given case will be left to the discretion of the appellate courts; they are not likely to invoke the doctrine in any but the most egregious circumstances. The clear lesson for defense counsel then is not to rely on the escape hatch offered by M.R.E. 103(d); instead, object in a timely fashion to all occurrences at trial which are perceived as injurious to the client's case. Trial counsel, on the other hand, should be aware of what could constitute plain error and protect the record of trial against appeal.

Objections During Instructions

As indicated in *Dyke,* while appellate courts increasingly insist that defense counsel perform their duties in a consistently competent manner, they will not require them to do the judge's job as well. Generally, a failure to object in the face of erroneous or incomplete instructions to the panel members will not constitute waiver.[69]

In *United States v. Mitchell,*[70] the military judge instructed the members that solicitation under Article 134 of the UCMJ required only general intent rather than specific intent. There was no objection to the instructions by the trial defense counsel. Nonetheless, the court declined to invoke waiver: "While in the instant case, no objection was made to the instruction at trial, there is no waiver of a defect relative to an essential element of the defense."[71]

In *United States v. Mason,*[72] a similar result was obtained for the appellant, but a distinct warning was given to trial defense counsel whose lack of diligence and persistence causes appellants to waive critical issues on appeal. In *Mason,* the trial defense counsel attempted on direct examination to elicit testimony from the appellant regarding his motivation for engaging in a drug transaction. The trial counsel objected to the line of questioning; the trial defense counsel responded that the testimony was not offered for the truth of the matter asserted. The military judge refused to admit the evidence, but, "the trial defense counsel made no protestation regarding the adverse ruling, failed to proffer the substance of the expected testimony, and made no attempt to explore its relevance."[73] After both sides rested, the trial defense counsel requested an instruc-

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[68]16 M.J. 64 (C.M.A. 1983). *See also* United States v. Goetz, 12 M.J. 744, 746 (A.C.M.R. 1983) (quoting United States v. Sims, 617 F.2d 1371, 1377 (9th Cir. 1980)) United States v. Calin, 11 M.J. 722 (A.F.C.M.R. 1981).

[69]*See* United States v. Thomas, 11 M.J. 315 (C.M.A. 1981); United States v. Graves, 1 M.J. 50 (C.M.A. 1975). M.R.E. 103(d) states, "Nothing in this rule precludes taking notice of plain errors that materially prejudice substantial rights although they were not brought to the attention of the military judge."

[70]15 M.J. 214 (C.M.A. 1983).

[71]*Id.* at 217. *See also* United States v. Ward, 16 M.J. 341 (C.M.A. 1983). *Cf.* United States v. McCray, 15 M.J. 1086 (A.C.M.R. 1983). In *McCray,* the appellant had been charged with assault with intent to commit sodomy. The trial defense counsel, with the concurrence of the accused, informed the military judge that instructions upon lesser included offenses were not requested because the defense did not believe that the members would convict the accused of the charged offense: "Defense counsel stated that he had discussed the matter with appellant and they had decided to request an 'all or nothing' instruction to force the members to make 'the true and hard decision.' " *Id.,* at 1087. The members did indeed convict the appellant of the charged offense and on appeal he argued that the trial judge was required to give instructions on lesser included offenses and that failure to do so constituted reversible error. The Army Court of Military Review decided the issue against the accused, stating, "[D]efense counsel's request, concurred in by the appellant, that the military judge refrain from instructing the members on any but the greater offense precluded appellant from contesting the issue on appeal. *United States v. Wilson,* 7 C.M.A. 713, 715, 23 C.M.R. 177, 179 (1957), *and cases cited therein." Id.* at 1088. It is important to note that in *McCray,* the defense never contended that the appellant lacked specific intent to commit sodomy. Had the appellant's specific intent to commit the substantive crime been an issue, the military judge's failure to instruct on lesser included offenses might well have been reversible error.

[72]14 M.J. 92 (C.M.A. 1982).

[73]*Id.* at 93.

tion on the defense of agency. At that time, he proffered the gist of the testimony he had expected to elicit from the appellant, which he believed would justify the agency instruction, before he was cut short by the trial counsel. The military judge refused to give the requested instruction, yet the trial defense counsel failed to request reopening of the case so that the expected testimony from the appellant could be heard.[74]

On appeal, the Court of Military Appeals reversed, holding that the appellant had been unduly hindered in presenting his case. In a footnote, however, the court sternly warned practitioners that future failures to adequately preserve critical issues for appellate review could raise the specter of inadequacy of representation.[75]

Such issues, however, continue to arise with frequency. In *Webel*, the appellant argued on appeal that the military judge's responses to a court member's queries regarding forfeitures during the judge's instructions on sentencing precluded the full and free exercise of the court's discretion. Noting that the trial defense counsel failed to object to the military judge's responses to the member's questions, the court applied the doctrine of waiver to the issue.[76]

A similar instructional issue arose in *United States v. Lawson*.[77] In *Lawson*, the military judge engaged in an exchange with the president of the court regarding balloting procedures. The president inquired whether it was permissible to take informal votes "to ascertain how the feeling is going."[78] The military judge replied that he had no objection to an informal "straw poll" and solicited the trial defense counsel's thoughts on the matter; he indicated that he had no objections to the military judge's response.[79] On appeal, the appellant contended that this straw poll procedure was erroneous and prejudiced him at trial. In his view, it enhanced the risk that the influence of superiority of rank would affect the balloting process. Moreover, he claimed that such a procedure ignored the "reconsideration provisions of Article 52(e) of the Manual for Courts-Martial."[80] The court found that nothing in the Manual for Courts-Martial nor the Uniform Code of Military Justice prohibited straw polls but did state that such a practice was not to be encouraged. Concluding that the appellant had not been prejudiced by the straw poll procedure, the court invoked the doctrine of waiver.[81]

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[74] *Id.*

[75] "As noted, trial defense counsel failed initially to proffer the substance of the excluded testimony to the military judge. Under the new military rules of evidence not yet in effect at the time of appellant's trial, a defense counsel is required to make known to the military judge by an offer of proof, unless it is apparent from the context, the substance of the evidence sought to be introduced, in order to preserve for appeal the question of the propriety of a ruling excluding the evidence. Mil. R. Evid. 103(a)(2). At the time of appellant's trial, no similar requirement existed. *See* para. 154c, Manual, *supra*. Thus, trial defense counsel's tender by questioning, accompanied by the specific ground for admissibility, *i.e.*, that the testimony was not offered for the truth of the matter asserted, was sufficient to preserve the issue for appeal... We do not decide today whether, as in the instant case, an untimely proffer of evidence, whether or not accompanied by a request to reopen the case, is sufficient to preserve an issue for appeal. Suffice it to say that Mil. R. Evid. 103 does not necessarily provide the panacea some practitioners might anticipate because the failure of a trial defense counsel sufficiently to preserve issues for appeal may well raise the much more troubling and difficult-to-resolve spector of inadequacy of representation. Counsel and military judges alike will be well-advised to minimize, to the extent practicable, such issues." *Id.* at 95 n.5.

[76] "[A] reading of the whole of these instructions convinces us that the military judge exercised considerable care to charge the members with the need to impose a sentence which would be appropriate under the circumstances of the case before them." The court went on to note that "defense counsel offered no objection to the military judge's response to the court's question, so any appellate objection thereto is waived." *Id.* at 66.

[77] 16 M.J. 38 (C.M.A. 1983).

[78] *Id.* at 40.

[79] *Id.*

[80] *Id.* at 41.

[81] "[W]e do not believe that this practice merits encouragement." However, finding under the facts of this case the straw poll procedure had not prejudiced the appellant in a manner amounting to plain error, the court went on to state, "Not only did defense counsel fail to object the 'straw poll' instruction at trial, in his *Goode* response and in his Article 38(c) brief, but also even to this day, there has been no defense attempt to establish by affidavit or otherwise that such a procedure was used by the court members, or that, if so, the 'straw poll' was conducted in an illegal manner." *Id.* at 41-42. *See also* United States v. Hudson, 16 M.J. 522 (A.C.M.R. 1983).

Post-Trial

The bulk of reported cases addressing the issue of waiver in post-trial matters have dealt with the failure of trial defense counsel to rebut erroneous or prejudicial post-trial reviews as required by *United States v. Goode.*[82] The general rule in post-trial matters is that a defense counsel must raise all objections to the staff judge advocate's post-trial review in his *Goode* rebuttal or the matters are waived, unless the omission would cause prejudice to the accused amounting to a miscarriage of justice.[83]

Errors deemed to have been waived by a failure to rebut include a post-trial review which incorrectly advised the convening authority about the permissible maximum sentence in a case[84] and a post-trial review which included post-trial comments by defense alibi witnesses.[85]

In *United States v. Shaw,*[86] the Army Court of Military Review commented upon such careless practices. In *Shaw,* the post-trial review incorrectly stated that the appellant had been convicted of a charge which in fact had been dismissed, yet no *Goode* rebuttal was submitted. Finding no prejudice to the appellant, the court applied waiver, but pointedly stated:

> We cannot find any excuse for a failure to accurately report to the convening authority those offenses of which the accused was convicted and those, if any, disposed of by other means such as acquittal or dismissal.... This warning, we trust, will serve notice that our patience is wearing thin.[87]

Conclusion

With the adoption of the Military Rules of Evidence, the doctrine of waiver will be applied by appellate courts with increasing frequency. Recent cases show that appellate courts are inclined to limit the scope of review available on appeal and they expect the facts upon which any appeal is grounded to have been thoroughly litigated at trial.

It is probable that the unrelenting emphasis on the need for competent counsel will continue in the future. For practitioners the lesson is clear: identify and fully litigate at the trial level all issues perceived to be critical to the case. Failure to do so will probably result in waiver on appeal.

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[82] 1 M.J. 3 (C.M.A. 1975).

[83] *Id.* at 6.

[84] United States v. Johnson, 8 M.J. 634 (A.C.M.R. 1979).

[85] United States v. Madey, 14 M.J. 651 (A.C.M.R. 1982).

[86] 14 M.J. 967 (A.C.M.R. 1982).

[87] *Id.* at 968.

Judiciary Notes

US Army Legal Services Agency

Digest—Article 69, UCMJ, Applications

A recent application under the provisions of Article 69, UCMJ, *Saiz,* SUMCM 1984/5524, illustrates a lack of sensitivity in evaluating the conduct of a service member with a legitimate medical problem that subsequently resulted in a medical profile. The accused was required to take a physical readiness test (APRT) on a Friday afternoon after working all day. When it became apparent that his scorer was not counting all of his pushups, the accused said, "Give me a break," and explained that a shoulder injury made it extremely difficult and painful for him to go all the way down.

This explanation was subsequently substantiated by the fact that the accused was given a permanent profile permitting him to perform pushups without going to the full down position

due to "myositis" of the left shoulder, as well as a temporary profile prohibiting him from doing any pushups for a four-month period. The accused's chain-of-command apparently had been made aware of this problem prior to that time.

Several days after the APRT, the accused's scorer gave a written statement to the effect that the accused had tried to get him to falsify the test score. This allegation was based on nothing more than the accused's words "give me a break." When the accused refused nonjudicial punishment, a charge of solicitation was referred to trial by summary court-martial. The accused was found guilty of solicitation in violation of Article 134, UCMJ.

The Judge Advocate General granted relief under Article 69, UCMJ. Under all the facts and circumstances, the evidence was considered insufficient, as a matter of law, to establish the accused's guilt beyond a reasonable doubt. In particular, it had not been shown that the accused's words reasonably may be construed as a "serious request" to commit an offense. *See* paragraph 161, MCM, 1969. The evidence also failed to show that the accused had the specific intention that the substantive offense, *i.e.*, falsification of the APRT score, be committed. *See United States v. Mitchell*, 15 M.J. 214, 216-17 (C.M.A. 1983). Finally, the record was devoid of evidence sufficient for this to qualify as a simple disorder. *See United States v. Kauble*, 14 M.J. 591 (A.C.M.R.), *petition granted*, 16 M.J. 176 (C.M.A. 1983).

The Judge Advocate General also granted relief under Article 69, UCMJ, in the case of *Anthony*, SUMCM 1984/5545. The summary court officer, who sentenced the accused to a forfeiture of pay, restriction, and reduction from SGT to E-4, made a written recommendation that the convening authority suspend the reduction. The convening authority, however, approved the sentence as adjudged. By affidavit submitted after the trial, the summary court officer stated that when he announced the sentence he believed that the convening authority would follow his recommendation regarding suspension of the reduction, otherwise he apparently would not have imposed a reduction.

The *Anthony* case illustrates a continuing problem that must be corrected. Judge advocates should make certain that every non-JAGC officer appointed as a summary court-martial is fully advised as to the scope of his or her sentencing authority, including the nonbinding effect of any clemency recommendation. Further, judge advocates performing supervisory review under Article 65(c), UCMJ, should ascertain whether or not the summary court officer properly understood the meaning and effect of a clemency recommendation, if such a recommendation has been made. If, despite prior briefings, it appears that the summary court officer misunderstood the effect of a clemency recommendation, appropriate relief should be given at the initial review state.

Automation at USALSA

The personnel of the Information Resource Management Office at USALSA are involved in a unique endeavor designed to assist division and office chiefs within the Agency in developing and defining their functional automation requirements. Designated as the Prototype Development Project (PROTO)), this effort has already placed personal computers in seven of USALSA's divisions, with several more to be delivered in the coming months. The divisions participating are: Contract Appeals, Regulatory Law, Trial Judiciary, Trial Defense Service, Professional Recruiting, Budget and the Library. Utilizing microcomputers and portables, PROTO is a fast and efficient means of educating Agency managers in automation technology and a vehicle to engender knowledgeable approaches to functional requirements in a hands-on setting. Considering the flexibility and processing power of microcomputers and the myriad of software packages available, many written with legal applications in mind, the use of these machines to accomplish the goals set out above is even more attractive.

All participating divisions/offices are or will be involved in automation of various manual systems including case tracking, data base management, personnel and budget management, inventory control, litigation support and other tasks. All of these subprojects are being conducted with a view toward procurement of USLASA's own minicomputer in the near future and the conversion of those applications

to such an environment. With automation as one of the most important goals of the Corps in the coming years, USALSA is using PROTO to achieve success in automation understanding and planning.

JAGC Automation

Automated Legal Research (ALR)

A USALSA planning group has developed a Model Military Justice Data Base for automated legal research. Once the list of statutes, cases, regulations, pamphlets, opinions and texts commonly used by JAGC attorneys is approved, it will be forwarded to West Publishing Company and Mead Data Central. The ALR vendors desire to expand the coverage of data bases of interest to military attorneys. USALSA has been advised that LEXIS and WESTLAW will each complete projects in July to expand data bases to include cases reported in the Court-Martial Reporter and the Military Justice Reporter. These materials are expected to be on-line by August. In August, West Publishing Company also expects to have Comptroller General Opinions, published and unpublished, on-line back to 1921. During the same time period, Mead Data Central expects to have the 1969 Manual for Courts-Martial with all changes in its LEXIS data base. The USALSA letter on contracting for ALR services in FY 85 will be forwarded to Army legal offices.

ACMR Case Management

The Commander, USALSA, has approved a concept plan for an automated case management system for the ACMR, Clerk of Court, DAD and GAD. This system will contain information on case processing and on GAD and DAD brief banks. The target completion date is 15 October 1984. It will not be available to the field during the initial stages, due to communication and security limitations.

Legal Assistance Items

Legal Assistance Branch, Administrative and Civil Law Division, TJAGSA

Reserve-Guard Judge Advocate Legal Assistance Advisory Committee

The Reserve-Guard Judge Advocate Legal Assistance Advisory Committee, which Major General Clausen authorized in June 1983, is now a reality. Announcement of the first seventeen members of the Committee was made in *The Army Lawyer* in February 1984. Since that time, appointments have been made in twenty-four additional jurisdictions and the name of the Committee has changed.

As originally organized, the Committee was named the Reserve Judge Advocate Legal Assistance Advisory Committee. To emphasize the increased cooperation and coordination between the Reserve Components and the active Army, however, the name was changed to reflect Army National Guard involvement in the Committee.

The most recent appointees are: Wisconsin—Major Donald H. Piper; Idaho—Captain Donald L. Burnett; New York—Captain Frank J. Labuda; Nebraska—Captain Graten D. Beavers; Iowa—Major Brendan T. Quann; Alaska—Lieutenant Colonel Kenneth O. Jarvi; Arkansas—Captain William Jackson Butt II: Indiana—Roger B. Cosbey; North Dakota—Major Keith C. Magnusson; Hawaii—Captain Robert L. Garett; Tennessee—Captain Robert W. Wilkinson; Vermont—Lieutenant Colonel Richard I. Burstein; Minnesota—Colonel Wayne R. Farnberg; Florida—Major Frank J. Pyle, Jr.; West Virginia—Major Edward C. Goldberg, ARNG; District of Columbia—Colonel W. Peyton George; Virginia—Captain Mark A. Exley; Montana—Captain Stephen F. Garrison; Oklahoma—Major William J. Baker and Major William W. Hood; Washington—Captain Verndal C.F. Lee; Alabama—Captain J. Duane Cantrell; Utah—Captain J. Garry McAllister; Delaware—Major Myron T. Steele,

ARNG; Mississippi—Captain Alan W. Carter.

The Committee has not yet appointed members in Arizona, Connecticut, Georgia, Kansas, New Hampshire, New Mexico, Oregon, Rhode Island, South Carolina, South Dakota, Guam, the Virgin Islands, and American Samoa.

The Committee was formed to assist The Judge Advocate General's School's Legal Assistance Branch on changes in state laws. The primary objectives of the Advisory Committee are:

(1) Assist the school's Legal Assistance Branch with updating the already published All States Guides;
(2) Assist the Branch with the publication of additional texts;
(3) Submit timely reports on selected topics in legal assistance, recent developments, recommended approaches, and model forms; and
(4) Answer specific state law questions submitted from the Branch.

The Advisory Committee will be comprised of at least one Reserve judge advocate or National Guard judge advocate appointed from each state and, where possible, each territory. Qualified Reserve or National Guard judge advocate volunteers are designated "Special Legal Assistance Officers" under paragraph 1-6*b*(2)(c), AR 27-3. Eligible officers may receive approximately thirty-five retirements points for each year they participate in the program. To earn these points under AR 140-185, an appointed officer will be required to do some combination of the following:

(1) Submit a quarterly report on recent state law developments which relate to legal assistance matters (*e.g.*, wills, divorce, state taxation);
(2) Review and update the appropriate state law summaries in the All States Guides;
(3) Provide additional state law summaries within a reasonable time upon request by the Legal Assistance Branch;
(4) Respond to inquiries from the Legal Assistance Branch concerning issues of state law raised in the field; and
(5) Provide additional advice on legal assistance matters to the Legal Assistance Branch, as needed.

The Advisory Committee is under the direct supervision of the Chief, Administrative and Civil Law Division, TJAGSA. He determines all issues concerning retirement points credit. The Legal Assistance Branch will be the direct point of contact between the School and the Committee. This Branch will also serve as liaison between the Committee and the field. Clerical support will be the responsibility of the individual Reserve or National Guard officer.

Retirement points for the work accomplished will be calculated in accordance with Rule 16, Table 2-1, AR 140-185, and paragraph 2-4*b*(3), AR 140-185. Advisory Committee members forward a completed DA Form 1380 along with their work product to the Chief, Administrative and Civil Law Division. He certifies the number of retirement points to be accredited and forwards the form to the Reserve Affairs Department, TJAGSA. The Reserve Affairs Department forwards the DA Form 1380 to RCPAC, mails a copy to the officer concerned, and maintains a copy in the officer's file.

Interested Reserve and National Guard judge advocates should submit a letter requesting consideration for the Advisory Committee with a current resume to The Judge Advocate General's School, ATTN: ADA-LA, Charlottesville, VA 22901. Committee members were initially appointed with terms to expire 31 December 1984. Those officers are eligible for reappointment, but other interested officers may apply. Committee members will be selected on the basis of their legal expertise in legal assistance-related areas of the law (*e.g.*, wills, family law, taxation).

All States Guides Available Through DTIC

The four editions of the All States Guides published by the Legal Assistance Branch, TJAGSA, have been placed in the Defense Technical Information Center (DTIC), and may be ordered by registered legal assistance offices worldwide at minimal expense.

Ordering information for the All States Will, Consumer Law, Garnishment, and Marriage

and Divorce Guides and the Income Tax Supplement is published separately in this issue in "Current Material of Interest."

However, DTIC furnished the wrong registration numbers for the Consumer Law and Will Guides and these incorrect numbers have been published in prior editions of *The Army Lawyer*. The correct ordering numbers are published in this edition under "Current Material of Interest." The correct ordering numbers for both are:

Consumer Law Guide—B077739
Will Guide—B077738

Legal assistance offices which desire to purchase the All States Guides from DTIC are required to establish an account with DTIC before the Guides may be ordered. Interested offices should contact DTIC, which will furnish an application form.

USFSPA Retroactivity Provision in California

Major W. Patrick Resen, a Reserve judge advocate in California, furnished the following information concerning a California law which affects the Uniformed Services Former Spouses' Protection Act (USFSPA):

Senate Bill No. 1034, which took effect 1 January 1984, provides that a California divorce decree which became final on or after 25 June 1981 and before 1 February 1983, may be modified to provide an award of the military retirement pension as community property. 25 June 1981 is the date on which the Supreme Court held that a California court's award of 45% of the retirement pension of an Army retiree violated the intent of Congress in establishing the military retired pay system (*McCarty v. McCarty*, 453 U.S. 210 (1981)). Congress responded with the USFSPA which took effect on 1 February 1983. Questions arose, however, about the retroactive effect of the USFSPA. The legislative history of the USFSPA indicates that issues involving modifications of decrees after 25 June 1981 and before 1 February 1983 should be left to state courts and legislatures.

California thus joins Nevada in passing legislation to specify that such decrees or final orders are subject to modification. Many state courts, relying on *McCarty*, entered orders declining to award a former spouse an interest in the retirement pension during the 25 June 1981 to 1 February 1983 period. The California statute provides that any former spouse with such an order may file a proceeding to modify the order and seek an interest in the pension until 1 January 1986. The law expires on 1 January 1986.

Survivor Benefits Instruction

Staff judge advocates and chiefs of legal assistance may be interested in an excellent program of instruction developed and being taught in the 9th Infantry Division, Fort Lewis, Washington.

This program of instruction in survivor benefits utilizes a checklist that details the various types and amounts of benefits available to the survivors of deceased active duty personnel. This program was devised primarily to reach the spouses of soldiers assigned to the division. It has been widely requested by numerous groups at Fort Lewis, such as the Officers Wives Club, the NCO Wives Club, and the Protestant Women of the Chapel, for presentation at their evening meetings. Many units assigned to the division and other tenant activities on the installation have also requested and received this instruction.

The class provides each participant with a *Survivor Benefit Checklist*. This allows the student to see what benefits are available and to fill in the monetary amounts presented in class that are applicable to their particular circumstances.

Such a program can be of great benefit to any legal assistance program and the surrounding military community. It provides a way to acquaint the spouses of service members, and service members themselves, with the wide range of benefits available to military families. The program has uncovered and corrected prevalent misconceptions about survivor benefits that exist in the military community. It also reminds people of the importance of legal assistance and has resulted in a great many of these people requesting and receiving much needed help in doing future family financial and estate planning. It also emphasizes the Army's commitment to helping Army families in this "Year

of the Family." Finally, this excellent program is a method of getting legal assistance attorneys and other judge advocates involved in community and command activities.

Survivor Benefit Checklist

	Lump Sum	Monthly
Pay and Allowance Due		
Death Gratuity (Paid in 72 hours)		
SGLI		
DIC		
Social Security (Monthly until youngest child is age 16)		
Social Security (Lump Sum)		
*Commercial Insurance		
Interment Allowance	_____	
Total Lump Sum	=====	
Total per month		=====

Commissary)
)
PX)
) Until Remarried
Club System)
)
Medical Care)

*Commercial term insurance of $115,000 for about $24 a month. This plus social security lump sum invested at a mere 6% will yield an additional $700.

New Dependency and Indemnity Compensation Rates

A 3.5% increase in Dependency and Indemnity Compensation rates became effective 1 April 1984. The monthly payments due surviving spouses of deceased service members are reflected below:

Pay Grade	Monthly Rate ($)
E-1	461
E-2	475
E-3	486
E-4	518
E-5	532
E-6	544
E-7	571
E-8	602
E-9	629
W-1	583
W-2	607
W-3	624
W-4	661
O-1	583
O-2	602
O-3	644
O-4	681
O-5	751
O-6	846
O-7	915
O-8	1,003
O-9	1,077
O-10	1,179

In addition to these amounts, surviving spouses with dependent children are eligible for additional compensation:

Children under age 18: $53 per month per child.
Children 18-23 in school: $118 per month per child.
Disabled children: $233 per month per child.

Dependency and Indemnity Compensation for children alone without surviving spouse:

One child: $233 per month.
Two children: $334 per month.
Three children: $432 per month.
More than three children: $432 per month plus $87 for each additional child.

Restraint of Competition by Multiple Listing Service

Legal assistance officers are occasionally asked to advise homeowners who are preparing to sell a residence. The requested information may include an explanation of the different types of real estate broker contracts, which types are available in the area, and the going rates for such contracts.

In many areas of the country, private multi-

ple listing services (MLS) are in operation. These firms typically have as members most of the real estate agencies which do business in a particular geographic area. Under such arrangements, all real estate agencies have the right to show and sell any property listed by an individual agency, agent, or broker. Upon sale of the property, the fee (generally six to seven percent of the sale price) is divided between the listing agency or broker and the selling agency or broker.

Legal assistance officers should be alert to the potential for undue restraint of trade when counseling clients on these matters. In at least one geographic area, the greater Michigan City area of LaPorte County, Indiana, many sellers apparently found that only one listing contract was available, an exclusive right to sell listing. That listing agreement requires the seller to pay the broker a commission if the property is sold, regardless of who located the purchaser. Open listings, which grant the broker only a non-exclusive agency and only obligate the owner to pay a commission to the broker who actually locates the buyer, were not available. Similarly, sellers were unable to include reserve clauses in exclusive right to sell contracts, which would permit the owner to sell the property to persons the owner individually named without having to pay a commission to the broker. The Federal Trade Commission (FTC) has alleged that such activities of the multiple listing service in that area have unreasonably restrained prices and competition among residential real estate brokers. The MLS in question provides a multiple listing service for member real estate brokerage firms doing business in LaPorte County. The complaint alleges that the MLS has conspired to unlawfully:

(1) Raise brokerage commission rates in Michigan City, LaPorte County's principal city, from six percent to seven percent of the sales price of the property;
(2) Stabilize brokerage commission rates county-wide;
(3) Obstruct truthful comparative advertising by members, including the advertising of low commission rates;
(4) Deny or delay MLS membership to new entrants, part-time firms, and firms operating out of the home, with the intent to deter new entry and to restrain price competition;
(5) Prohibit members from using, and from publishing on the multiple listing service, any "exclusive right to sell" brokerage service contract involving an individual home seller that includes a provision reserving the home seller's right to sell (without owing a commission) to specific persons individually named in the contract;
(6) Prohibit members from entering into any brokerage service contract that the MLS does not allow to be published on its multiple listing service (*i.e.*, the MLS, which only allows "exclusive right to sell" contracts to be published, prohibits member use of "exclusive agency" contracts or "open" contracts for brokering apart from the multiple listing service);
(7) Restrict member participation in ventures and services that compete with the multiple listing service; and
(8) Restrict the ability of members and home sellers to cancel a brokerage service contract before its expiration date.

The complaint alleges that these acts and practices violate section 5 of the Federal Trade Commission Act of 1914, as amended.

In settlement of the alleged violations of federal law, the FTC has prepared a consent order requiring the MLS to cease and desist from the alleged illegal practices. That proposed order was published in the Federal Register for public comment. (*See* 49 Fed. Reg. 21073, May 18, 1984).

Legal assistance officers should be aware of this case and inform their clients of the potential problem since similar practices may be occurring elsewhere. The FTC is available for advice, assistance, and investigation. Complaints may be referred to Alan J. Friedman, FTC/P-852, Washington, D.C. 20580, (202) 724-1213.

FLITE Assistance for Legal Assistance Attorneys

The following item appeared in the April-July 1984 FLITE Newsletter, and discusses a research asset which can be of great benefit to legal assistance attorneys:

"Legal Assistance Officers occupy a unique and difficult position among Judge Advocates of the various services. They are called upon to counsel and advise active duty and retired service members and their dependents on a wide variety of legal subjects. Often this work must be done with limited library facilities.

On a typical day, a Legal Assistance Officer may encounter the following types of questions:

1. A service member stationed in South Carolina wants to know whether a child support and custody decree from Ohio can be modified.

2. A service member from South Dakota wants to know if his brother in Texas can be the executor of his will. He also wants to know if he'll have to pay taxes on the gain on the sale of his house.

3. A service member getting a divorce wants to know if he and his wife can have their household goods shipped to different locations on his permanent change of station move.

4. A serviceman who purchased encyclopedias from a door-to-door salesman feels that he's been cheated. He only has the name of the company. How does the Legal Assistance Officer find out the address of the company's headquarters and the names of its officers?

FLITE attorneys have the resources for researching each of these questions. Questions concerning domestic relations, wills, insurance, or consumer affairs will require researching state law. FLITE attorneys have access to state appellate court decisions through both the LEXISR and WESTLAWR systems.

Questions concerning taxation may require examination of the Internal Revenue Code, Court decisions, and administrative rulings of the Internal Revenue Service. Decisions of the Federal District Courts, Courts of Appeal, Supreme Court, Tax Court, and Claims Court can be researched using the FLITE system. LEXISR and WESTLAWR have Revenue Rulings and other administrative decisions of the IRS. The decisions of the Comptroller General provide valuable authority in resolving many questions concerning pay, entitlements or reimbursement. FLITE attorneys have both the published and unpublished decisions available for researching.

An inquiry about the officers or location of the headquarters of a business could be answered by the FLITE attorney's using the DIALOGR system. Dunn and Bradstreet and other business related indexes can be accessed through the use of this system.

Using FLITE can enable the Legal Assistance Officer to perform more efficiently by providing research in materials that are not readily available. In most cases a full text printout of the necessary materials can be provided upon request.

Telephone numbers for FLITE are: Commercial—(303) 370-7531; Autovon—926-7531; FTS—(303) 370-7531; Off Duty Phone (Autovon)—926-2611; Off-Duty Phone (FTS/Commercial)—(303) 370-2611; TTY (for hearing impaired)—926-7900 (Autovon) and (303) 370-7900 (FTS/Commercial). FLITE is a service of the Department of the Air Force. Its address is FLITE, Denver CO 80279.

Hawaii Automatic Wage Assignments for Support Added

In addition to entering wage assignments for the enforcement of child support pursuant to either a delinquency adjudication or a petition entered by the party to whom the support debt is owed, Hawaii courts may now include an automatic wage assignment as part of any child support order. The automatic assignment would take effect without a court hearing if the obligor is delinquent for at least one month.

Automatic assignments are subject to the same requirements as assignments ordered pursuant to a petition. They become effective immediately after service on the employer by certified mail and have priority over any other

garnishment, attachment, execution, or assignment, unless otherwise ordered by the court. Assignments made pursuant to both a petition and automatic assignments have been excluded from the general garnishment exemptions and exclusions, as well as the special exemption applicable to pensions. The employer is entitled to deduct a $2 administrative fee from the employee's earnings for each payment made and is prohibited from discharging an employee on the basis of either type of assignment.

Rhode Island Child Support Procedures Expanded

Rhode Island has expanded its child support wage assignment procedures for both voluntary and involuntary assignments effective 1 September 1984. These procedures do not affect those applicable to support for children receiving public assistance.

For voluntary assignments required under a support order of the family court, the employer is required to remit the amount of income withheld pursuant to the assignment to the clerk of the court at least once each calendar month. Under the present law the frequency is not specified. The $1 fee that an employer may deduct from the employee's remaining income for each payment made pursuant to the assignment has been increased to $2.

In the case of involuntary assignments (those in which an assignment has not been made pursuant to a family court order) the employer's fee has also been increased from $1 to $2.

Both voluntary and involuntary assignments remain in effect until revoked by the court. Currently, the law provides that assignments dissolve without court action thirty days after the employment relationship ends. Although state limitations do not apply to the amount of income which may be withheld, as of the effective date of the law, federal limitations applicable to garnishments will apply to wage assignments for support.

Vermont Wage Assignments for Support Authorized

Vermont courts may now issue a wage assignment order against an individual who is delinquent in the payment of either child or spousal support in an amount greater than 1/12 of the annual support obligation. The employer must begin withholding wages upon receipt of a wage assignment order and notice of the recipient's address. Such withholding must continue until notice to cease is received from the issuing authority, or, in the case of child support, until the youngest child covered by the order attains majority.

Wage assignments for current support are not subject to the general garnishment exemptions and have priority over other periodic payments applied to reduce support arrearages. Withholding for both current support and support arrearages is permitted only if the claim for arrearages has been reduced to judgment and income is available which is not exempt under the garnishment law. The law, which was effective 1 July 1984, allows the employer to retain a fee of not more than $5 per month to cover administrative costs incurred in complying with a wage assignment. An employer is prohibited from discharging any employee on account of a wage assignment.

Iowa Changes Garnishment Limits

The amount of an employee's earnings which are subject to garnishment in Iowa has changed. Now, the amounts subject to garnishment may not exceed the following limits in any one calendar year for each judgment debtor:

-$250 if expected earnings are less than $12,000;
-$400 if expected earnings are $12,000 or more but less than $16,000;
-$800 if expected earnings are $16,000 or more but less than $24,000;
$1,500 if expected earnings are $24,000 or more but less than $35,000;
-$2,000 if expected earnings are $35,000 or more but less than $50,000; or
-10% if expected earnings are $50,000 or more.

Until 1 July 1984, when the law became effective, the maximum amount of an employee's earnings which had been subject to garnishment in any calendar year was $250 for each judgment creditor, regardless or the expected earnings of the employee.

Iowa Adds Wage Assignments for Support Payments

In the same law which changed the garnishment limitation, Iowa provided for mandatory wage assignments in an amount subject to the federal garnishment limitations in the event that support payments made pursuant to a voluntary wage assignment are delinquent for at least one month. These mandatory assignments are binding on existing and future employers ten days after receipt of the wage assignment order by certified mail. They must be given priority over garnishments and assignments issued for purposes other than support. The employer is entitled to deduct not more than $1 from each payment as reimbursement for costs incurred in complying with the assignment.

Additionally, Iowa employers are required to honor duly executed assignments of current or future earnings issued to enforce support debts owed to the Iowa Department of Human Services for the repayment of public assistance benefits paid to a dependent child. The assignment is effective until released by the welfare department. The employer is entitled to collect a $1 fee from the debtor for each payment made under the wage assignment. These provisions also took effect 1 July 1984.

Continuing Trend in Toughening Support Laws

The items in this section concerning garnishment and wage assignment laws in Iowa, Vermont, Rhode Island and Hawaii are evidence of a growing trend in states to enact such provisions. Previous issues have contained information on similar laws enacted in Washington, Utah, Virginia, Illinois and Texas. The information on these laws appearing is this issue were adapted from June editions of the Commerce Clearing House Installment Credit Guide.

Enlisted Update

Sergeant Major Walt Cybart

AR 611-201

Final approval has been obtained for our requested changes to AR 611-201. These changes will be published in the next revision of AR 611-201, sometime in September or October 1984. Dates for implementation of these changes are:

a. January through March 1985: Basic implementation of changes to AR 611-201.

b. April 1985: Lateral appointment to SSG for all SP6s will begin.

c. September 1985: Reclassification to comply with new moral standards will begin.

When these changes become effective, the burden of implementation will fall upon the field. To insure the success of this project, chief clerks, warrant officers, and SJAs must move quickly to have these changes posted to their manpower documents. Let us avoid what happened several years ago when the failure to obtain the necessary document changes prevented the Corps from obtaining several E8 positions that had been authorized for MOS 71E. I solicit your support to insure that all of the pending changes to AR 611-201 are fully implemented and documented.

SQT

Reports from Fort Eustis on early FY84 SQT results are encouraging. As of 20 June the mean scores are:

Skill level	Mean score
1	70
2	74
3	80
4	79

Our SQT developers at Fort Ben Harrison are working on a new Soldiers Manual. All legal clerks are requested to send their recommendations for changes, to include new task areas, deletion of existing task areas, or elimination of individual questions to: USA Soldier Support Center, ATTN: ATZI-TD-SQ (SFC Nydam), Fort Ben Harrison, IN 46216. This is your chance to provide input to the SQT system; don't let it go by. Send your suggestion in early. SFC Nydam hopes to have the draft copy of the Soldiers Manual ready for review by December 1984. At the request for our SQT developers, the FY85 SQT for MOS 71D/71E has been cancelled. The next period will be FY86. This will allow revision of the SQT test material to comply with the new MCM and AR 27-10

Chief Clerks Course

Our 4th Chief Legal Clerk/Senior Court Reporter Course ended 25 May. Chief clerks and court reporters from CONUS, Europe, and Okinawa attended this year, including several of our reserve counterparts. A detailed after-action report will be sent to each GCM jurisdiction when completed: target month is September 1984.

New MCM

The 1984 Manual for Courts-Martial may be ordered on the DA Form 12 series as Miscellaneous Publication 9-2; the cover/binder for the 1984 MCM is Miscellaneous Publication 9-2-1.

AR 27-10

All Legal Clerks and Admin Techs are requested to carefully review the new AR 27-10, especially chapters 3, 5 and 12, for administrative matters that may need to be added or deleted. Please furnish any suggested changes to: HQDA (DAJA-CL), ATTN: MAJ Studer, WASH DC 20310-2213, or call MAJ Studer at Autovon 227-1484. Your assistance is requested to help insure that AR 27-10 contains everything necessary to make our jobs easier.

CLE News

1. Changes in TJAGSA Correspondence Course Program

On 1 December 1984, The Judge Advocate General's School's correspondence course program will be substantially revised. These changes are designed to conform the nonresident correspondence instruction program to the resident instruction program offered at TJAGSA, to reflect changes in the law, and to bring the courses in compliance with Army regulations regarding common military subjects. New subcourses have been added to the curriculum and others have been updated. The credit-hour values of many of the subcourses have been revised to conform them to courses offered in the TJAGSA resident instruction program. This means that a student will receive a different number of credit hours for essentially the same subcourse after 1 December 1984. This will also impact on the retirement points and promotion points awarded for the successful completion of the course.

The Judge Advocate Officer Advanced Correspondence Course curriculum has been revised to decrease the credit-hour value of the subcourses from a maximum of 559 hours to a maximum of 366 hours. The annual credit-hour requirement will be reduced from 120 hours annually to 75 hours annually. The required subcourses in the curriculum have been increased from 39 to 46 subcourses. The elective subcourses have been eliminated from the curriculum. Students may no longer elect to take the Law of the Sea option in place of the common military subjects offered in Phase I. The common military subjects offered in Phases I, III, and V have been revised to conform with current Army regulatory guidance. Phase VII has been expanded and will require the completion of both JA 150, Legal Research and Writing Program, and JA 151, Fundamentals of Military Legal Writing.

The Judge Advocate Officer Basic Correspon-

dence Course curriculum has been revised to increase the credit-hour value of the subcourses from 170 hours to 177 hours. The required subcourses in the curriculum have been increased from 21 to 25 subcourses. The required time for course completion will remain at one year. The common military subjects in Phase I have been substantially revised and will include additional hours.

The credit-hour value of the subcourses in the Legal Administrative Technician Correspondence Course curriculum has been decreased from 244 hours to 189 hours. The annual credit-hour requirement to maintain enrollment in the program will be reduced from 120 hours annually to 95 hours annually.

The credit-hour value of the subcourses for the completion of the Law for Legal Clerks Correspondence Course has been decreased from 45 hours to 18 hours. The course content will remain the same but the credit hour values for the JA subcourses will be revised.

The course of instruction for Miscellaneous Students will remain the same except that the credit-hour value for the JA subcourses has been revised.

Students enrolled in the correspondence course program will automatically be transferred to the new curriculum and will receive the revised credit-hour values for subcourses completed after 1 December 1984. Subcourses completed prior to the implementation date that are not a part of the new curriculum will count toward the annual credit-hour completion requirements and toward retirement points. They will not count toward course completion requirements unless the course is completed prior to 1 December 1984.

After 1 December 1984, course completion requirements for the Judge Advocate Officer Advanced Correspondence Course and the Judge Advocate Officer Basic Correspondence Course will be determined by the new curriculum requirements. In order to successfully meet the course requirements for graduation all changes to the curriculum must be satisfied. This may require a student to take newly added courses in phases that were completed under the old program but to which revisions have now been made. Students enrolled in the Legal Administrative Technician Correspondence Course, the Law for Legal Clerks Correspondence Course, and the Miscellaneous Students Course will not be required to take additional courses due to these changes. However, they will be affected by the revision of the credit-hour values for JA subcourses and changes in the total credit hours required for course completion.

All students enrolled in the correspondence course program should carefully review the current status of their course work to determine if the proposed changes will affect any of the courses in which they are currently enrolled or in which they plan to enroll in the near future. Any questions concerning these changes should be directed to the Correspondence Course Office at TJAGSA:

The Judge Advocate General's School,
U.S. Army
ATTN: JAGS-ADN-C
Charlottesville, Virginia 22901
AUTOVON: 274-7110, ask operator for commercial 293-4046
Commercial: (804) 293-4046
FTS: 938-1304

Judge Advocate Officer Basic Correspondence Course

Phase I	Military Subjects	
Number	Subcourse Title	Credit Hours
INO 330	M16A1 Rifle	6
INO 548	Physical Training	4
ISO 263	First Aid in Disaster	4
INO 109	NBC Operations	9
MPO 075	Civil Disturbances I	15

Number	Subcourse Title	Credit Hours
ISO 299	Code/Conduct, Survive, Evade, Resist, Escape	1
EO 002	Equal Opportunity Policy, Staff Organization and Procedures	7
FA 8123	Organizational Effectiveness	8
ISO 238	Drug Abuse	3
AGO 405	Military Correspondence	8
AGO 005	Benefits for Servicemen & Their Families	9
ITO 641	Safeguarding of Defense Information	12
AGO 367	Military Boards and Investigations	10
FA 8018	The Army Divisions	6
		102

Phase II **Legal Subjects**

Number	Subcourse Title	Credit Hours
JA 2	Standards of Conduct and Professional Responsibility	3
JA 12	Government Contracts	6
JA 20	Intro'n to Ad & Civil Law and Military Legal Bibliography	3
JA 21	Legal Basis of Command	9
JA 22	Military Personnel Law and Boards of Officers	6
JA 23	Civilian Personnel Law and Labor-Management Relations	3
JA 25	Claims	6
JA 26	Legal Assistance	9
JA 36	Fundamentals of Military Criminal Law and Procedure	15
JA 43	The Law of Land Warfare	6
JA 58	Staff Judge Advocate Operations	9
	Phase II:	75
	Phase I:	102
	Total:	177

Judge Advocate Officer Advanced Correspondence Course

Phase I **Required Military Subjects**

Number	Subcourse Title	Credit Hours
INO 548	Physical Training	4
COM 959	NBC Defense and Material	4
MPO 076	Civil Disturbances II	16
EO 006	Special Influences on Equal Opportunity	2
FA 8123	Organizational Effectiveness	8
ISO 238	Drug Abuse	3
	Total:	37

Phase II **Criminal Law Subjects**

Number	Subcourse Title	Credit Hours
JA 130	Nonjudicial Punishment..... 3	
JA 131	Courts-Martial Evidence	3
JA 132	Constitutional Evidence	9
JA 133	Pretrial Procedure	9

Number	Subcourse Title	Credit Hours
JA 134	Trial Procedure	6
JA 135	Post Trial Procedure	3
JA 136	Review of Summary and Special Courts-Martial	3
JA 137	Crimes and Defenses	3
JA 160	Professional Responsibility	3
	Total:	42

Phase III **Military Subjects—Command and Management**

Number	Subcourse Title	Credit Hours
ISO 205	Personnel Management	4
ISO 208	Command and Staff Procedures	10
ISO 233	Resource Management	16
AGO 046	Fundamentals of Management	12
AGO 067	Civilian Personnel Management	10
FI 63	Office Management	18
	Total:	70

Phase IV **Administrative and Civil Law Subjects**

Number	Subcourse Title	Credit Hours
JA 121	Legal Basis of Command: Command of Installations	9
JA 122	Legal Basis of Command: Military Aid to Law Enforcement	3
JA 123	Legal Basis of Command: Environmental Law	6
JA 124	Legal Basis of Command: Nonappropriated Fund Instrumentalities	6
JA 126	Government Information Practices	6
JA 127	Military Personnel Law	6
JA 128	Claims (FTCA, PC, FCA)	6
JA 129	Legal Assistance Programs, Administration and Selected Problems	9
	Total:	51

Phase V **Military Subjects—Training, Skills, and Orientation Subjects**

Number	Subcourse Title	Credit Hours
AGO 015	The Officer Evaluation Reporting System	6
AGO 112	Reserve Components Retention	4
DP 133	Basic Data Processing Software Concepts	11
FA 8018	The Army Divisions	6
ISO 252	Foreign Armies Orientation	2
ISO 283	Civil Affairs Orientation	2
ISO 285	Map Reading	6
ITO 641	Safeguarding Defense Information	12
	Total:	49

Phase IV **Contract and International Law Subjects**

Number	Subcourse Title	Credit Hours
JA 112	Government Contract Law	15
JA 115	Fiscal Law	6
JA 140	JA Operations Overseas	9
JA 142	Law of War	9
	Total:	39

Phase VII	Legal Research and Writing and Administrative Law Courses	
Number	**Subcourse Title**	**Credit Hours**
JA 150	Legal Research and Writing Program	42
JA 151	Fundamentals of Military Legal Writing	15
JA 120	Defensive Federal Litigation	9
JA 125A	Law of Federal Employment	6
JA 125B	Law of Federal Labor-Management Relations	6
	Total:	78
	Total Number of Credit Hours:	366

Credit Hour Changes

Law for Legal Clerks Correspondence Course

Number	Subcourse Title	New Credit Hours	Old Credit Hours
JA 20	Introduction to Administrative and Civil Law, and Military Legal Bibliography	3	6
JA 30	Introduction to Military Criminal Law	6	30
JA 58	Staff Judge Advocate Operations	9	9
		18	45

Legal Administration Correspondence Course

Number	Subcourse Title	New Credit Hours	Old Credit Hours
JA 2	Standards of Conduct and Professional Responsibility	3	6
JA 23	Civilian Personnel Law and Labor-Management Relations	3	6
JA 25	Claims	6	9
JA 26	Legal Assistance	9	6
JA 36	Fundamentals of Military Criminal Law and Procedures	15	24
JA 125A	Law of Federal Employment	6	6
JA 130	Nonjudicial Punishment	3	9
JA 133	Pretrial Procedure	21	21
JA 134	Trial Procedure	16	15
JA 135	Post Trial Procedure	8	18
JA 136	Review of Summary of Special Courts-Martial	2	9
		92	147

2. Resident Course Quotas

Attendance at resident CLE courses conducted at The Judge Advocate General's School is restricted to those who have been allocated quotas. If you have not received a welcome letter or packet, you do not have a quota. Quota allocations are obtained from local training offices which receive them from the MACOM's. Reservists obtain quotas through their unit or ARPERCEN, ATTN: DARP-OPS-JA, if they are non-unit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOM and other major agency training offices. To obtain a quota or verify a quota, you must contact Mrs. Kathryn R. Head, Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22901 (Telephone: AUTOVON 274-7110, extension 293-6286; commercial phone: (804) 293-6286; FTS: 938-1304).

3. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	*Reporting Month*
Alabama	31 December annually
Colorado	31 January annually
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Iowa	1 March annually
Kentucky	1 July annually
Minnesota	1 March every third anniversary of admission
Montana	1 April annually
Nevada	15 January annually
North Dakota	1 February in three year intervals
South Carolina	10 January annually
Washington	31 January annually
Wisconsin	1 March annually
Wyoming	1 March annually

Effective 1 July 1984, Kentucky lawyers are required to complete fifteen hours of continuing legal education each year. The first reporting date is 1 July 1985. Further information may be obtained from the Kentucky Bar Association Continuing Legal Education Commission, W. Main at Kentucky River, Frankfort KY 40601. *For addresses and detailed information, see the January 1984 issue of* The Army Lawyer.

4. TJAGSA CLE Course Schedule

September 10-14: 27th Law of War Workshop (5F-F42).

September 24-28: 3d Advanced Federal Litigation Course (5F-F29).

October 2-5: 1984 Worldwide JAG Conference.

October 15-19: 7th Claims Course (5F-F26).

October 15-December 19: 105th Basic Course (5-27-C20).

October 22-26: 13th Criminal Trial Advocacy Course (5F-F32).

October 29-November 2: 19th Fiscal Law Course (5F-F12).

November 5-9: 6th Legal Aspects of Terrorism Course (5F-F43).

November 5-9: 15th Legal Assistance Course (5F-F23).

November 26-December 7: 101st Contract Attorneys Course (5F-F10).

December 3-7: 28th Law of War Workshop (5F-F42).

December 10-14: 8th Administrative Law for Military Installations (5F-F24).

January 7-11: 1985 Government Contract Law Symposium (5F-F11).

January 14-18: 26th Federal Labor Relations Course (5F-F22).

January 21-25: 14th Criminal Trial Advocacy Course (5F-F32).

January 21-March 29: 106th Basic Course (5-27-C20).

February 4-8: 77th Senior Officer Legal Orientation Course (5F-F1).

February 11-15: 5th Commercial Activities Program Course (5F-F16).

February 25-March 8: 102nd Contract Attorneys Course (5F-F10).

March 4-8: 29th Law of War Workshop (5F-F42).

March 11-15: 9th Administrative Law for Military Installations (5F-F24).

March 11-13: 3d Advanced Law of War Seminar (5F-F45).

March 18-22: 1st Administration and Law for Legal Clerks (512-71D/20/30).

March 25-29: 16th Legal Assistance Course (5F-F23).

April 2-5: JAG USAR Workshop.

April 8-12: 4th Contract Claims, Litigation, & Remedies Course (5F-F13).

April 8-June 14: 107th Basic Course (5-27-C20).

April 15-19: 78th Senior Officer Legal Orientation Course (5F-F1).

April 22-26: 15th Staff Judge Advocate Course (5F-F52).

April 29-May 10: 103d Contract Attorneys Course (5F-F10).

May 6-10: 2nd Judge Advocate Operations Overseas (5F-F46).

May 13-17: 27th Federal Labor Relations Course (5F-F22).

May 20-24: 20th Fiscal Law Course (5F-F12).

May 28-June 14: 28th Military Judge Course (5F-F33).

June 3-7: 79th Senior Officer Legal Orientation Course (5F-F1).

June 11-14: Chief Legal Clerks Workshop (512-71D/71E/40/50).

June 17-28: JAGSO Team Training

June 17-28: BOAC: Phase VI.

July 8-12: 14th Law Office Management Course (7A-713A).

July 15-17: Professional Recruiting Training Seminar

July 15-19: 30th Law of War Workshop (5F-F42).

July 22-26: U.S. Army Claims Service Training Seminar.

July 29-August 9: 104th Contract Attorneys Course (5F-F10).

August 5-May 21 1986: 34th Graduate Course (5-27-C22).

August 19-23: 9th Criminal Law New Developments Course (5F-F35).

August 26-30: 80th Senior Officer Legal Orientation Course (5F-F1).

5. Civilian Sponsored CLE Courses

November

1: SBT, Family Law Series, Dallas, TX.

1: IICLE, Pre-Nuptual Agreements, Springfield, IL.

1-2: NCLE, Real Estate, Omaha, NB.

5: IICLE, Real Estate Licensing Review, Chicago, IL.

5-9: UDCL, Concentrated Course in Government Contracts, Washington, DC.

7-9: FPI, Medicine in the Courtroom, Chicago, IL.

8: IICLE, Successful Law Firms/ISBA Midyear Meeting, Chicago, IL.

9: IICLE, Pre-Nuptual Agreements, Chicago, IL.

9-10: ALIABA: Civil Practice & Litigation—Federal/State Court, Washington, DC.

9-11: IICLE, Trial Bar Skills for Practicing Attorneys, Chicago, IL.

11-15: NCDA, Special Crimes—Investigation to Trial, New Orleans, LA.

11-16: NJC, Search and Seizure—Specialty, Reno, NV.

11-16: NJC, Admin. Law: High Volume Proceedings—Graduate, Reno, NV.

11-16: NJC, New Trends in Child Custody & Support—Specialty, Reno, NV.

11-16: NJC, Court Management/Managing Delay—Specialty, Reno, NV.

11-16: NJC, Managing Delay—Specialty, Reno, NV.

11-17: IICLE, ISBA Mid-Year Meeting Courses, Las Hadas, MX.

12: PLI, Amendments to Federal Rules of Evidence, San Francisco, CA.

12: IICLE, Trial Evidence Seminar, Chicago, IL.

12-16: AAJE, The Many Roles of a Judge—and Consequences, New Orleans, LA.

13: IICLE, Post-Mortem Estate Planning, Chicago, IL.

14: IICLE, Computer Seminars, Chicago, IL.

14-15: IICLE, Employment Discrimination, Chicago, IL.

15-16: FPI, Commercial Contracting, Washington, DC.

16: WSBA, Appellate Practice, Seattle, WA.

16: IICLE, Negotiating Government Contracts, Chicago, IL.

16-17: NCLE, Evidence, Lincoln, NB.

19: IICLE, Computers in Tax Practice, Chicago, IL.

25-29: Prosecution of Violent Crime, Incline Village, NV.

26-29: TOURO, Fundamentals of Government Contracting, Washington, DC.

28-29: IICLE, Real Estate Syndication, Chicago, IL.

30: WSBA, Appellate Practice, Spokane, WA.

30: IICLE, Venture Capital Seminar, Chicago, IL.

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. This need is satisfied in many cases by local reproduction of returning students' materials or by requests to the MACOM SJAs who receive "camera ready" copies for the purpose of reproduction. However, the School still receives many results each year for these materials. Because such distribution is not within the School's mission, TJAGSA does not have the resources to provide these publications.

In order to provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). There are two ways an office may obtain this material. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. Other government agency users pay three dollars per hard copy and ninety-five cents per fiche copy. The second way is for the office or organization to become a government user. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314.

Once registered, an office or other organization may open a deposit account with the National Technical Information Center to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer.*

The following TJAGSA publications are available through DTIC: (The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.)

AD NUMBER	*TITLE*
AD B077550	Criminal Law, Procedure, Pretrial Process/JAGS-ADC-83-7

AD B077551	Criminal Law, Procedure, Trial/JAGS-ADC-83-8
AD B077552	Criminal Law, Procedure, Posttrial/JAGS-ADC-83-9
AD B077553	Criminal Law, Crimes & Defenses/JAGS-ADC-83-10
AD B077554	Criminal Law, Evidence/ JAGS-ADC-83-11
AD B077555	Criminal Law, Constitutional Evidence/JAGS-ADC-83-12
AD B078201	Criminal Law, Index/JAGS-ADC-83-13
AD B078119	Contract Law, Contract Law Deskbook/JAGS-ADK-83-2
AD B079015	Administrative and Civil Law, All States Guide to Garnishment Laws & Procedures/JAGS-ADA-84-1
AD-B077739	All States Consumer Law Guide/JAGS-ADA-83-1
AD-B079729	LAO Federal Income Tax Supplement/JAGS-ADA-84-2
AD-B077738	All States Will Guide/ JAGS-ADA-83-2
AD-B078095	Fiscal Law Deskbook/ JAGS-ADK-83-1
AD-B080900	All States Marriage & Divorce Guide/JAGS-ADA-84-3

Those ordering publications are reminded that they are for government use only.

2. Videocassettes

The Television Operations Office of The Judge Advocate General's School announces that the videocassettes listed below are available to the field. If you are interested in obtaining copies of any of these programs, please send a blank 3/4" videocassette of the appropriate length to: The Judge General's School, U.S. Army, ATTN: Television Operations, Charlottesville, Virginia 22901.

Tape #/Date Running Time	Title/Speaker/Synopsis
(7th Administrative Law for Military Installations—26-30 March 1984)	
JA-295-1 Mar 84 53:38	**Criminal Law Topics** Speaker: Major Stephen Smith, Instructor, Criminal Law Division, TJAGSA. Presented are selected Criminal Law topics relevant to the administrative law attorney. Recent developments in inspections, check-point examinations, and apprehensions in private dwellings are highlighted.
JA-295-2 Mar 84 48:33	**Nonappropriated Fund Instrumentalities/Private Organizations, Part I** Speaker: Major Ward King, Instructor, Administrative and Civil Law Division, TJAGSA. Instruction centers on the law and operational principles related to nonappropriated fund instrumentalities and private organizations operating on Army installations.
JA-295-3 Mar 84 27:25	**Nonappropriated Fund Instrumentalities/Private Organizations, Part II** A continuation of JA-295-2.
JA-295-4 Mar 84 29:53	**Environmental Law** Speaker: Major Michael Schneider, Instructor, Administrative and Civil Law Division, TJAGSA. Review of selected environmental law statutes that impact on the operation of military installations and a review of the extent of the commander's obligation to comply with federal, state, and local pollution abatement requirements.
JA-295-5 Mar 84 58:00	**Military Aid to Law Enforcement** Speaker: Lieutenant Colonel Robert Hilton, USMC, Instructor, Administrative and Civil Law Division, TJAGSA. The subject of military support to civilian law enforcemtn is addressed by examining the Posse Comitatus Act and important statutory exceptions to the Act.

Tape #/Date Running Time	Title/Speaker/Synopsis
JA-295-6 Mar 84 52:03	**Nonappropriated Funds Instrumentalities: Contracting** Speaker: Major Julius Rothlein, Instructor, Contract Law Division, TJAGSA. An examination of the law related to non-appropriated fund contracting and the role of the legal advisor in the nonappropriated fund contracting process.
JA-295-7 Mar 84 58:08	**Suspension and Debarment of Government Contractors** Speaker: Major Julius Rothlein, Instructor, Contract Law Division, TJAGSA. An examination of the grounds and procedures for the debarment and suspension of government contractors, and the relationships between the installation legal advisor and the Chief, Contract Fraud Branch, Litigation Division, Office of The Judge Advocate General, U.S. Army.
JA-295-8 Mar 84 44:08	**Marine Corps Personnel Law: Officers, Part I** Speaker: Captain David Anderson, USMC. An examination of recent developments relating to officer status and elimination.
JA-295-9 Mar 84 52:28	**Marine Corps Personnel Law: Officers, Part II** A continuation of JA-295-8.
JA-295-10 Mar 84 48:30	**Debt Collection** Speaker: Major Charles Hemingway, Instructor, Administrative and Civil Law Division, TJAGSA. An examination of the major areas in which administrative law attorneys frequently receive inquiries from commanders and staff sections concerning matters in which service members may be subject to offsets and deduction from pay. These include nonsupport, letters of indebtedness, and the Debt Collection Act of 1982.
JA-295-11 Mar 84 47:49	**Marine Corps Personnel Law: Enlisted, Part I** Speaker: Major James Walker, USMC. An examination of recent developments relating to the separation of enlisted personnel.
JA-295-12 Mar 84 52:12	**Marine Corps Personnel Law: Enlisted, Part II** A continuation of JA-295-11.
May 84	**1984 Manual for Courts-Martial** Members of the Working Group of the Joint-Service Committee on Military Justice discuss the major changes in military criminal justice contained in the 1984 Manual for Courts-Martial. This rule-by-rule survey of the new Manual highlights areas of particular importance to commanders and judge advocates. This program requires seven one-hour videocassettes.

3. Regulations & Pamphlets

Number	*Title*	*Change*	*Date*
AR 27-10	Military Justice		1 Jul 84
AR 210-7	Commercial Solicitation on Army Installations	901	4 May 84
AR 600-20	Personnel-General: Army Command Policy and Procedure	903	23 May 84
AR 608-1	Personal Affairs: Army Community Service Program	903	23 May 84
AR 623-105	Personnel-Evaluation Report	901	22 Mar 84
AR 635-100	Personnel Separations: Officer Personnel	906	25 May 84

4. Articles

Anastaplo, *Legal Realism, the New Journalism, and The Brethren*, 1983 Duke L.J. 1045 (1983).

Baker, *Is the United States Claims Court Constitutional?*, 32 Clev. St. L. Rev. 55 (1983).

Barrett, *Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice*, 32 Emory L.J. 937 (1983).

Brickner, *Justice Benjamin N. Cardozo: A Fresh Look at a Great Judge*, 11 Ohio N.U.L. Rev. 1 (1984).

Burnett, *Protecting and Regulating Commercial Speech: Consumers Confront the First Amendment*, 5 Comm./Ent. L.J. 637 (1983).

Carlisle, Harris & Skitol, *Government Liability for Statutory Torts: A Search for Precedent*, 15 Urb. Law. 817 (1983).

Cohen, *The Two-Thirds Verdict: A Surviving Anachronism in an Age of Court-Martial Evolution*, 20 Cal. W.L. Rev. 9 (1983).

Edwards, *International Legal Aspects of Safeguards and the Non-Proliferation of Nuclear Weapons*, 33 Int'l & Comp. L.Q. 1 (1984).

Freed & Foster, *Family Law in the Fifty States: An Overview*, 17 Fam1 L.Q. 365 (1984).

Gasser, *Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon*, 33 Am. U.L. Rev. 145 (1983).

Gutheil & Appelbaum, *"Mind Control," "Synthetic Sanity," "Artificial Competence," and Genuine Confusion: Legally Relevant Effects of Antipsychotic Medication*, 12 Hofstra L. Rev. 77 (1983).

Hauserman & Fethke, *Military Pensions as Divisible Assets: The Uniformed Services Former Spouses' Protection Act*, 11 J. Legis. 27 (1984).

Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C.L. Rev. 177 (1984).

Joseph, *The Protective Sweep Doctrine: Protecting Arresting Officers From Attack by Persons Others Than the Arrestee*, 33 Cath. U.L. Rev. 95 (1983).

Landsman, *A Brief Survey of the Development of the Adversary System*, 44 Ohio St. L.J. 713 (1983).

Loewy, *Protecting Citizens From Cops and Crooks: An Assessment of the Supreme Court's Interpretation of the Fourth Amendment*, 62 N.C.L. Rev. 329 (1984).

Comment, *Chemical and Biological Warfare: Focus on Asia*, 16 Vand. J. Transnat'l L. 387 (1983).

Comment, *Expert Legal Testimony*, 97 Harv. L. Rev. 797 (1984).

Comment, *Linking Educational Benefits With Draft Registration: An Unconstitutional Bill of Attainder?*, 21 Harv. J. on Legis. 207 (1984).

Administrative Law: Government Disclosure and Judicial Review of Agency Rulemaking, 1983 Ann. Surv. Am. L. 213.

China's Legal Development, 22 Colum. J. Transnat'l L. 1 (1983).

Death Penalty Issues: A Symposium, 74 J. Crim. L. & Criminology 659 (1983).

By Order of the Secretary of the Army:

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